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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:	)	
	)	
A. J. BATSON CONSTRUCTION COMPANY	)	**Docket No. 12.28-108760A**
	)	**WC Appeal - Insurance**
	)	
and	)	
	)	
NEW HAMPSHIRE 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 as to Findings of Fact and Conclusions of Law in this matter. The Petitioner, A. J. Batson d/b/a A. J. Batson Construction Company ("A. J. Batson"), was represented at the hearing by Attorney William R. Goodman, III. The Respondent, New Hampshire Insurance Company ("New Hampshire"), was represented by Attorney Robins H. Ledyard.

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 Petitioner's July 9, 2010 appeal are whether New Hampshire correctly determined that Class Code 5645 (Carpentry-Detached One or Two Family Dwellings) was the correct classification for six (6) individuals covered under the workers' compensation insurance policy issued to A. J. Batson from February 17, 2009 through February 17, 2010 (the "Policy Period"), rather than the risk classification which would apply for each individual based on the specific type of work each performed.

After consideration of all evidence presented in this matter, it is determined that, except as otherwise noted herein, New Hampshire correctly assigned Class Code 5645 to the six (6) individuals during the Policy Period. 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 in this matter pursuant to Tenn. Code Ann. § 56-5-309(b).

2. A. J. Batson Construction Company is the trade name of a sole proprietorship owned and managed by A.J. Batson engaged in residential home construction.

3. New Hampshire is authorized to sell, among other types of insurance, workers' compensation insurance policies in the State of Tennessee and is a Servicing Carrier for the Tennessee Workers' Compensation Insurance Plan ("TWCIP"). New Hampshire operates as a subsidiary of Chartis U.S., Inc. ("Chartis"), an American International Group, Inc. ("AIG") member company.

4. New Hampshire issued Workers' Compensation and Employers Liability Insurance Policy Number WC 007198147 (the "Policy") to A. J. Batson Construction for the period February 17, 2009 through February 17, 2010 (the "Policy Period").

5. Part Five of the Policy includes the following provisions:

A. Our Manuals

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain businesses or classifications. These classifications were assigned based on an estimate of the exposures you should have during the policy period. If your actual exposures were not properly described by these classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium of each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. All your officers and employees engaged in work covered by this policy; and
2. All other persons engaged in work that could make us liable under Part One (Workers' Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as a premium basis. This Paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers' compensation obligations.

* * * *

E. Final Premium

The premium shown on the Information Page, schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications, and rates, that lawfully apply to the business and work covered by this policy. If the final premium is more

than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

* * * *

G. Audit

You will let us examine and audit all of your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determined final premium. Insurance rate service organizations have the same rights we have under this provision.

7. A physical audit of the Policy was conducted in May 2010 by Dana Sweatt ("Ms. Sweatt"), an associate premium auditor employed by AIG.

8. On May 18, 2010, New Hampshire issued an Audit Advice based on the audit conducted by Ms. Sweatt, indicating that A. J. Batson owed additional premium, the amount representing the difference between the estimated premium when the Policy was issued and premium based on the final audit after the end of the Policy Period. Such difference was primarily due to the reclassification of the following individuals to Class Code 5645 (Carpentry-Detached One or Two Family Dwellings): Randy Young d/b/a Young's Cabinets, Kelly Sneed, Anthony Leding d/b/a A & D Insulation, Shawn Monfette, Derrick McGuire and Brandon Batson).

9. Each of the individuals listed in Paragraph 8, above, performed different types of work on residential construction projects for A. J. Batson, as follows:

Contractor	Type of Work Performed
Brandon Batson	supervisor and project manager
Randy Young d/b/a Young's Cabinets	cabinetry
Kelly Sneed	drywall finish work
Anthony Leding d/b/a A & D Insulation	insulation
Derrick McGuire	debris cleaning
Shawn Monfette	hardwood flooring

11. On July 30, 2010, AIG issued a workers' compensation audit report which determined that, although each of the individuals listed in Paragraph 8, above, performed different types of work, Class Code 5645 was applicable for the payroll of such individuals whose work falls within the scope of residential carpentry during the Policy Period.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, A. J. Batson, 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. § 56-5-320(c) requires each insured to be a member of the designated rate service organization and to adhere to a uniform risk classification system filed by such organization and approved by the Commissioner.

3. Pursuant to Tenn. Code Ann. § 56-5-320, the National Council on Compensation Insurance ("NCCI") is the designated rate service organization for the State of Tennessee.

4. 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.

5. Rule 1-D-3-d of the *Basic Manual* provides as follows:

> Construction or Erection Operations
>
> Each distinct type of construction or erection operation must be assigned to the class that specifically describes the operation only if separate payroll records are maintained for each operation.
>
> If separate payroll records are not maintained for any construction or erection operation, the highest rated classification that applies to the job or location where the operation is performed must be assigned.
>
> If a construction or erection operation is included in the scope of another classification, a separate code must not be assigned.

(1) Insured Subcontractors

An insured subcontractor who performs a single type of work on a construction project or job must be classified based on the classification that describes the particular type of work involved.

* * * *

(2) Uninsured Subcontractors

Uninsured subcontractors covered under the principal or general contractor's policy are classified on the basis of the classifications that would apply if the work were performed by the principal's or general contractor's own employees.

5. A. J. Batson has failed to show by a preponderance of the evidence that the assignment of Class Code 5645 to the six (6) individuals specified in Paragraph 8 of the Findings of Fact was in error. Although each of such individuals performed different types of work for which they would have been classified differently if they had individual workers' compensation policies, when all carpentry work in construction of a private residence is performed by employees of the same contractor, the *Scopes Manual* provides in pertinent part as follows with regard to Class Code 5645:

> When all of the carpentry work in connection with the construction of a private residence is performed by employees of the same contractor, the work is assigned to Code 5645. This includes the construction and erection of the sill, rough framework, rough floor, studs, joists, rafters, roof deck, all types of roofing materials, sidewall sheathing, siding, doors, wallboard installation, lathing, windows, stairs, finished flooring, cabinet installation, fencing, decking and all interior wood trim . . . 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 . . . .

6. Since the Policy issued to A. J. Batson was written as a sole proprietorship, only the owner, A. J. Batson, was excluded from coverage. Brandon Batson was, therefore, covered under the Policy as if he was an employee, and Class Code 5645 was correctly applied to the payroll for him. As project manager, his duties were purely supervisory in nature. They included inspecting

work at job sites and calling a subcontractor, Brian Eden, to perform additional work required. Class Code 5606 (Contractor-Project Manager, Construction Executive, Construction Manager or Construction Superintendent) would appear to be appropriate; however, such classification is available only where the project manager exercises control indirectly, through a supervisor or foreman at each job site. The *Scopes Manual* states in pertinent part as follows:

> The qualifications established for 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 in determining their job duties and not their title as well as that the supervision must be indirect rather than direct. ...

7. Class Code 5645 would be the proper classification code for Brandon Batson through December 30, 2009; however, effective December 31, 2009, a Tennessee state special Class Code 5604 (Construction—Executives, Supervisors or Foremen Overseeing Jobsites—Not Performing Actual Construction Work) was developed for new, renewal, and outstanding policies, Class Code 5604 should, therefore, be applied to the payroll for Brandon Batson, beginning December 31, 2009.

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. Class Code 5645 was properly applied to the payroll for Randy Young d/b/a Young's Cabinets, Kelly Sneed, Anthony Leding d/b/a A & D Insulation, Shawn Monfette, and Derrick McGuire during the Policy Period, resulting in additional premium due of $12,857.00, which amount is due and payable;

2. Class Code 5645 was properly applied for the payroll for Brandon Batson from February 17, 2009 through December 30, 2009, after which period Class Code 5604 should be applied and pro-rated accordingly for the remainder of the Policy Period, December 31, 2009 through February 17, 2010; and

3. Costs of this proceeding are taxed against the Petitioner, A. J. Batson Construction Company.

This Final Order is entered and effective this the 22nd day of March, 2011.

Marie Murphy

Marie Murphy
Executive Assistant to Commissioner

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 23rd, day of March, 2011.

Thomas G. Stovall LSH

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 23d day of March, 2011:

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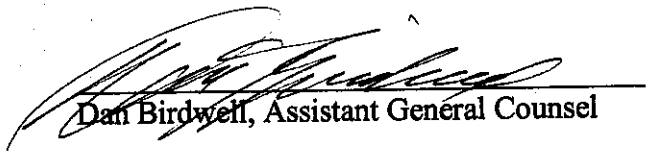

Dan Birdwell, Assistant General Counsel