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

RECEIVED
2015 DEC -2 AM 11:42
SECRETARY OF STATE

IN THE MATTER OF:	)	
	)	
PROSHOT CONSTRUCTION, LLC	)	**Doc. No.: 12.28-130016A**
	)	**WC Appeal – Insurance**
	)	
and	)	
	)	
TECHNOLOGY INS. CO.	)	
	)	

FINAL ORDER

This matter was heard on August 17, 2015, before the Honorable Mary M. Collier, Administrative Law Judge, appointed by the Secretary of State, with Maliaka Bass, Deputy General Counsel 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, ProShot Construction, LLC ("ProShot"), is a limited liability company and was represented by Attorneys Philip L. Robertson and Brittany M. Bartkowiak. The Respondent, Technology Insurance Company ("Technology 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 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 whether Technology Insurance is owed additional premium by ProShot. The disputed issues are:

1. Whether Luis Munoz, a contractor who performed work on behalf of ProShot, should be properly classified as an independent contractor of ProShot; thereby absolving ProShot of any workers' compensation insurance coverage liability on the work performed by Mr. Munoz.

2. Whether Luis Munoz, while performing work on behalf of ProShot, was covered under a valid workers' compensation policy or under a valid exemption, and whether ProShot is therefore liable for the workers' compensation insurance coverage costs attributable to the work performed by Mr. Munoz from its workers' compensation insurance carrier, Technology Insurance.

Upon consideration of the record and for the reasons stated below, it is determined that the petition brought by ProShot is without merit and that ProShot owes additional premium to Technology Insurance in the amount of eighty four thousand three hundred and seven dollars and eighty cents ($84,307.80).

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

FINDINGS OF FACT

1. ProShot is a limited liability company engaged in the business of residential remodeling, roofing and painting, and is owned by Casey Stein and John Martin.

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. Technology Insurance is an insurance company licensed to sell workers' compensation insurance coverage in Tennessee and was at all relevant times the underwriting carrier for ProShot workers' compensation insurance through the TWCIP.

4. ProShot obtained workers' compensation insurance from Technology Insurance for the policy year September 12, 2012 to September 12, 2013.

5. During the policy year, ProShot engaged the services of Luis Munoz whom ProShot represents to be affiliated with a company referred to as Midsouth Construction Management.

6. ProShot contends that Luis Munoz, as an employee and part owner of Midsouth Construction Management, was covered under Midsouth Construction Management's workers' compensation policy.

7. The record contains evidence concerning several different and presumably related companies operating under the name of Midsouth Construction Management.

8. For calendar years 2012 and 2013, ProShot issued an IRS form 1099 to "Luis Munoz Mid South Const Management" showing a total compensation of $327,684.87 for those two years. ProShot first issued the 1099s listing Luis Munoz's social security number as the recipient with an address for both Luis Munoz and "Mid South Const Management" at 5260 Summer Wind Lane, Arlington, TN. During the course of the workers' compensation premium audit, ProShot reissued corrected 1099s for 2012 and 2013, listing an EIN number purportedly belonging to Midsouth Construction Management as the recipient. The address on the corrected 1099 indicates an address for both Luis Munoz and "Mid South Const Management" as 134 Timber Creek Dr. #102, Cordova, TN.

9. In Exhibit 1, there is a certificate of liability insurance for general liability and workers' compensation liability issued to "Midsouth Constr Mgt" by Berkley Regional Insurance Company. The insurance producer is listed as Uthe Financial Services with a policy period of September 27, 2011 to September 27, 2012. This exhibit includes the words "Andrian Munoz" under the category of "description of operations/locations/vehicles/exclusions added by endorsement/special provisions." There is also a handwritten annotation "Luis Munoz 11/12" at the bottom of the exhibit. No evidence was presented explaining the relevance of the name "Andrian Munoz" or the handwritten annotation.

10. Exhibit 7 is a workers' compensation exemption registration and identifies "Midsouth Construction Management" as a "sole proprietor" and lists the exempt registry applicant's name as "David Uthe," with effective dates between April 18, 2011 and March 1, 2014. The business address for Midsouth Construction Management is listed as 134 Timber Creek Drive, #102, Cordova, TN.

11. Exhibit 10 is a record from the Tennessee Secretary of State showing that a corporation named "Midsouth Construction Management, Inc." existed as of August 31, 2009, and was administratively dissolved on August 12, 2012.

12. Exhibit 11 is a record from the Tennessee Secretary of State showing that a corporation named "Midsouth Construction Management II Inc." existed as of January 5, 2012, until it was dissolved on August 13, 2013.

13. The entities referenced in Exhibit 10 and Exhibit 11 both list David Uthe of 134 Timber Creek Drive, #102, Cordova, TN as the registered agent and principal address of the corporations.

14. Casey Stein testified that before engaging the services of Luis Munoz, ProShot received a copy of Exhibit 1, a certificate of workers' compensation coverage showing that

Midsouth Construction Management had a certificate of workers' compensation coverage from December 31, 2011 to December 31, 2012, issued by Berkley Regional Insurance Company. ProShot contends that Luis Munoz was covered by this workers' compensation policy issued to Midsouth Construction Management.

15. In Exhibit 12, by affidavit, Lisa Vandermey of Berkley Assigned Risk Services, testified that Midsouth Construction Management had a valid policy from Berkley from December 31, 2011 to December 31, 2012. This policy was renewed on December 31, 2012 and was subsequently cancelled on May 9, 2013. The affidavit also states that in its policy application, Midsouth Construction Management represented to its carrier that it was only seeking workers' compensation insurance coverage for clerical employees. The affidavit of Lisa Vandermey and the testimony contained therein was not challenged or contradicted by ProShot.

16. ProShot contends that Midsouth Construction generally, and Luis Munoz specifically, were not obligated to obtain workers' compensation insurance coverage during the policy year because Midsouth Construction was registered with the Secretary of State as an exempt construction services provider.

17. ProShot points to Exhibit 7 as proof of Midsouth Construction Management's registration as an exempt construction services provider. Exhibit 7, however, claims Midsouth Construction Management to be a sole proprietorship, and the registrant in Exhibit 7 is David Uthe. No evidence was presented to show that Luis Munoz had individually registered as an exempt construction services provider.

18. Technology Insurance conducted a premium audit at the conclusion of the policy year. As a result of this audit, Technology Insurance determined that it faced exposure for the work performed by Luis Munoz on behalf of ProShot. After calculating discounts and partial payments by the insured, Technology Insurance asserts that it is still owed $84,307.80.

19. While disputing the contention that it owes additional premium based on the work performed by Luis Munoz, ProShot has not disputed that $84,307.80 is the amount of additional premium due should the amount of payroll attributed to work performed by Luis Munoz be deemed to be covered under the policy.

CONCLUSIONS OF LAW

1. In accordance with Tenn. Comp. R. & Regs. 1360-04-01-.02(3) and (7), the Petitioner, ProShot, 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. Tenn. Code Ann. § 50-6-901(5) defines a "construction services provider" as "... any person or entity engaged in the construction industry."

3. Tenn. Code Ann. § 50-6-914 provides, in pertinent part, as follows:

> (a) Except as provided for in subsection (b), a general contractor, intermediate contractor or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the general contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.
>
> (b) (1) Notwithstanding subsection (a) and subject to subdivision (b)(2), a general contractor, intermediate contractor or subcontractor shall not be liable for workers' compensation to a construction services provider listed on the registry established pursuant to this part

. . .

4. Tenn. Code Ann. § 50-6-903 provides, in pertinent part, as follows:

> (a) Any construction services provider who meets one (1) of the following criteria may apply for an exemption from § 50-6-902(a):
>
> (1) An officer of a corporation who is engaged in the construction industry; provided, that no more than five (5) officers of one (1) corporation shall be eligible for an exemption;
>
> (2) A member of a limited liability company who is engaged in the construction industry if such member owns at least twenty percent (20%) of such company;

> (3) A partner in a limited partnership, limited liability partnership or a general partnership who is engaged in the construction industry if such partner owns at least twenty (20%) of such partnership;
>
> (4) A sole proprietor engaged in the construction industry; or
>
> (5) An owner of any business entity listed in subdivisions (a)(1)-(3) that is family-owned; provided that no more than five (5) owners of one (1) family-owned business may be exempt from § 50-6-902(a).

5. Luis Munoz, either acting individually or on behalf of Midsouth Construction Management, received compensation from ProShot for the performance of work in the construction industry, and therefore is a construction services provider.

6. ProShot's contention that the work performed by Luis Munoz was done in his capacity as an independent contractor is not attributable to ProShot's workers' compensation liability exposure is without merit. Luis Munoz, regardless of whether there was an intermediate employer between Mr. Munoz and ProShot, acted as a subcontractor of ProShot. Under Tenn. Code Ann. § 50-6-914, ProShot is liable for ensuring that Luis Munoz is either covered under an intermediate employer's policy or is an exempt construction services provider.

7. ProShot would not be liable to Technology Insurance Company for premium attributable to the work performed by Luis Munoz for ProShot if ProShot can demonstrate that Luis Munoz was covered by an intermediate employer's workers' compensation policy. Tenn. Code Ann. § 50-6-914(c). ProShot contends that Luis Munoz was covered by a workers' compensation policy issued to Midsouth Construction Management.

8. ProShot failed to present any evidence that Luis Munoz was covered by an active workers' compensation policy during the term of ProShot's policy with Technology Insurance. ProShot did present evidence that an entity named "Midsouth Constr Mgt," at the time Luis Munoz first began subcontracting for ProShot, had active workers' compensation coverage,

(Exhibit 1), from Berkley Regional Insurance Company. However, ProShot failed to prove by a preponderance of the evidence that Luis Munoz was covered under this particular policy.

It is impossible to ascertain from the record who is actually covered by the Berkley policy. The record is riddled with evidence that there were at least two corporations and a sole proprietorship operating during the relevant time period under various iterations of the name "Midsouth Construction Management." The policy documents themselves show that the policy was written to cover clerical employees and not workers engaged in construction. The burden of proof was on ProShot to show by a preponderance of the evidence that Luis Munoz was covered by a workers' compensation policy. No evidence was presented to demonstrate by any standard of proof, much less by a preponderance of the evidence, that Luis Munoz was covered by this Berkley policy. Without such proof, ProShot failed to demonstrate by a preponderance of the evidence that Luis Munoz was covered by Midsouth Construction Management's workers' compensation policy.

9. ProShot further contends that Luis Munoz was a part owner of "Midsouth Construction Management," and that Midsouth Construction Managment was on the exempt registry, and therefore is not liable for covering him under their workers' compensation policy.

10. In support of this assertion, ProShot presented Exhibit 7. This exhibit lists "David Uthe" as the applicant for the Workers' Compensation Exemption Registration. It lists the name of the company as "Midsouth Construction Management" and that it is a sole proprietorship. Luis Munoz's name appears nowhere in this exhibit as a registered exempt person. ProShot's attorney described "Midsouth Construction Management" as an "exempt company" during the hearing. There is, however, no such concept named in the Tennessee Workers' Compensation law. A person who is a sole proprietor, director, or at least twenty percent owner of a construction service provider company may individually apply and register

with the Secretary of State to be an exempt construction service provider. Tenn. Code Ann. § 50-6-903(a). One well established canon of statutory construction is the expression of one thing implies the exclusion of all things not expressly mentioned. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 84 (Tenn. 2001). Since Tenn. Code Ann.§ 50-6-903(a) only discusses an individual construction services provider registering on the exemption registry, we can reasonably construe that statute to exclude a blanket registration that covers all members of a company.

11. ProShot has not even presented convincing evidence of what exactly is "Midsouth Construction Company" and what ownership relationship Luis Munoz has with it. Exhibit 7 further undercuts ProShot's position in this case. ProShot consistently argued that Luis Munoz was not directly employed by ProShot, but instead that ProShot had contracted with Midsouth Construction Management and vigorously asserted that Luis Munoz was a Midsouth Construction Management employee and/or owner. In Exhibit 7, a sole proprietorship owned by David Uthe and operating under the name Midsouth Construction Management is registered as an exempt construction services provider. To be on the exempt registry, one must generally own at least twenty percent of the business. *See* Tenn. Code Ann. § 50-6-903(a). If Luis Munoz does not own twenty percent of the business, he would not even be eligible to register as an exempt construction services provider. Per Exhibit 7, David Uthe claims one hundred percent ownership of Midsouth Construction Management as a sole proprietorship in his registration as an exempt construction services provider.

12. However, even if ProShot had presented evidence that Luis Munoz owned at least some portion of some company operating under some variation of the name "Midsouth Construction Management," such evidence would still not have advanced their case without evidence that Luis Munoz individually had registered as an exempt construction services

provider. Accordingly, Luis Munoz is not an exempt construction provider under Tenn. Code Ann. § 50-6-903.

13. Having failed to show that Luis Munoz is covered by another policy of workers' compensation or an exempt construction services provider, ProShot has failed to meet its burden of proof to show that it was not responsible for obtaining workers' compensation coverage for the payroll attributable to the work performed by Luis Munoz. Under the terms of its workers' compensation policy, Technology Insurance is entitled to premium derived from the work performed by Luis Munoz on behalf of ProShot.

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

1. ProShot shall pay additional premium to Technology Insurance in the amount of eighty four thousand three hundred seven dollars and eighty cents ($84,307.80) for the September 12, 2012—September 12, 2013 policy period within sixty (60) days of the entry of this Order.

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

Maliaka Bass
Commissioner's Designee

NOTICE OF APPEAL PROCEDURES

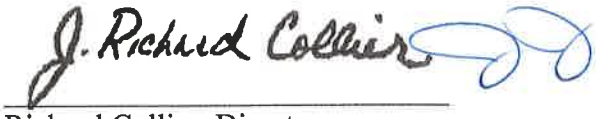
Review of Final Order

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.
>
> * * * * *
>
> (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.

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 2nd day of December, 2015.



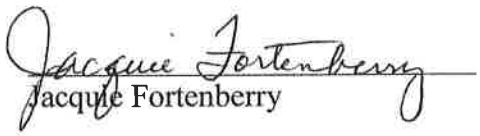
Richard Collier, Director
Administrative Procedures Division

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 2nd day of December, 2015:

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

Brittany Bartkowiak
Philip Robertson
1896 General George Patton Drive
Suite 600
Franklin, TN 37067



Jacquie Fortenberry