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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: )  
)  
THERACO, INC. )  
)  
and ) Docket No. 12.28-101475A  
) WC Appeal - Insurance  
THE CONTINENTAL CASUALTY )  
COMPANY and TRAVELERS )  
PROPERTY CASUALTY COMPANY )  
OF AMERICA )

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FINAL ORDER

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This matter was heard on March 2, 2009 in Nashville, Tennessee before Administrative Steve Darnell, appointed by the Secretary of State, with Larry C. Knight, Assistant Commissioner of Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner's Designee, Mr. Knight makes the final determination as to Findings of Facts and Conclusions of Law in this matter. The Petitioner, Theraco, Inc. ("Theraco") was represented at the hearing by Attorney Laurenn S. Disspayne. Continental Casualty Company ("CNA") and Travelers Property Casualty of America ("Travelers") was represented by Attorney Ben Rose.

The subject of the hearing was: (1) whether physical therapists, physical therapy assistants, and other therapists contracting with Theraco ("Contracted Therapists") to provide therapy services based on referrals received by home health agencies should be considered "employees" within the meaning of Tenn. Code Ann. § 50-6-102(10), or independent contractors; (2) whether Theraco has five (5) or more employees and should, therefore, be considered an "employer" within the meaning of the Tenn. Code Ann. § 50-6-102(11); and (3)

whether Theraco owes additional premium attributed to the fees paid to Contracted Therapists and additional risk assumed by CNA and Travelers.

After due consideration of the record, it is determined that: (1) Contracted Therapists should be considered independent contractors rather than employees; (2) Contracted Therapists should not be included in determining whether Theraco is considered an "employer" within the meaning of Tenn. Code Ann. § 50-6-102(11); and (3) Theraco does not owe additional premium to CNA or Travelers based on its contracts with Contracted Therapists.

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 over this matter pursuant to Tenn. Code Ann. § 56-5-309(b).

2. Theraco is a for-profit corporation which contracts with home health agencies to provide home-based therapy services on a fee-for-service basis to patients in Middle Tennessee. Theraco contracts with Contracted Therapists licensed by the State of Tennessee and provides referrals for services it has agreed to provide under its contracts with home health agencies. The principle office of Theraco is located at 2847 Polo Club Road, Nashville, Tennessee 37221-4345.

3. Contracted therapists receive referrals for services from Theraco, schedule initial evaluations with patients, establish a plan of care approved by the patient's physician, and invoice Theraco after services have been provided.

4. Theraco has four (4) salaried employees, two (2) of which are officers of the company that have elected exemption from workers' compensation coverage, and two (2) full-time clerical employees for which Theraco obtained workers' compensation insurance coverage under the policies referenced in Paragraphs 8 and 16.

5. Theraco invoices home health agencies for services provided by Contracted Therapists, pays them bi-weekly on a per-visit basis, and provides various other administrative services. Theraco does not withhold individual income taxes, provide employee benefits, or reimburse Contracted Therapists for mileage.

6. CNA and Travelers each 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.

7. On or about February 7, 2007, the President of Theraco, Jeff McEver, ("Mr. McEver") completed and signed an application to obtain workers' compensation insurance coverage for Theraco through the Tennessee Workers' Compensation Insurance Plan ("TWCIP").

8. CNA issued workers' compensation and employers liability insurance Policy Number 6S59UB-0314L48-A—07 to Theraco for the period March 4, 2007 through March 4, 2008 ("2007 CNA Policy"). Such policy was renewed (Policy Number 6S59UB-0314L48-A—08) for the period March 4, 2008 through March 4, 2009 ("2008 CNA Policy").

9. On January 24, 2008, CNA sent a Supplementary Underwriting Information Request ("Information Request") to Theraco requesting, among other things, copies of certificates of insurance related to professional liability and automobile insurance for therapists, physical therapy assistants and other therapists associated with Theraco.

10. In response to the Information Request, Theraco provided copies of certificates of insurance, some of which referenced "Master Insurance Policy No. 188711433." Theraco did not provide additional information regarding the "Master Policy, and CNA concluded from the information provided that policies covering Contracted Therapists were interconnected, rather than separate policies.

11. On or about April 4, 2008, CNA conducted a physical audit of Theraco with regard to the 2007 CNA policy, based on which CNA determined that Contracted Therapists were Theraco employees, or would be deemed to be Theraco employees, and billed Theraco one hundred thirty two thousand two hundred sixty-seven dollars (\$132,267.00) in additional premium.

12. On May 9, 2008, Theraco advised CNA that it disputed the results of the physical audit for the 2007 CNA Policy.

13. On or about July 8, 2008, Theraco requested that the 2008 CNA policy be cancelled. Such policy was cancelled effective July 10, 2008.

14. On or about July 3, 2008, Mr. McEver completed and signed another application for workers compensation insurance coverage through the TWCIP. The application did not state that Theraco had previously obtained coverage through the TWCIP under a policy issued by CNA.

15. Based on Theraco's July 2008 application for coverage for workers' compensation coverage through the TWCIP, Travelers issued workers' compensation and employers liability insurance Policy Number 7PJUB-0201M28-08 insuring Theraco employees for the policy period July 4, 2008 through July 4, 2009.

16. On or about January 31, 2009, Theraco requested that the Travelers policy be cancelled, and such Policy was cancelled effective the same date.

17. On June 3, 2008, CNA advised Theraco that it had determined that an employer-employee relationship existed between Theraco and Contracted Therapists would not be applied with regard to the 2007 CNA Policy. CNA further advised that such determination would be applicable in determining premiums for the 2008 CNA Policy.

18. On June 20, 2008, Theraco filed an appeal with the Department of Commerce and Insurance, Docket No. 12.28-099568A, contesting the premium billing for the 2008 CNA Policy. Such appeal was, however, dismissed by mutual agreement of the parties on August 26, 2008 because a physical audit of Theraco had not been completed.

19. A physical audit of the 2008 CNA Policy was conducted by Tom Brecht which determined that Theraco owed additional premium of forty-four thousand eighty-nine dollars (\$44,089).

20. Workers' compensation insurance policies specified in Paragraph's 8 and 16 contain the following provisions:

#### **Classifications**

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

#### **Remuneration**

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

#### **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.

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short-rate cancellation table and procedure. Final premium will not be less than the minimum premium.

\* \* \* \* \*

### CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, Theraco, 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 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 is defined in subdivision (11), under any 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;

(B) "Employee" includes a sole proprietor or a partner who devotes full time to the proprietorship or partnership and elects to be included in the definition of employee by filing written notice of the election with the division at least thirty (30) days before the occurrence of any injury or death, and may at any time withdraw the election by giving notice of the withdrawal to the division;

(C) The provisions of this subdivision (10), allowing a sole proprietor or a partner to elect to come under this chapter, shall not be construed to deny coverage of the sole proprietor or partner under any individual or group accident and sickness policy the sole proprietor or partner may have in effect, in cases where the sole proprietor or partner has elected not to be covered by the provisions of the Workers' Compensation Law, for injuries sustained by the sole proprietor or partner that would have been covered by the provisions of the Workers' Compensation Law had the election been made, notwithstanding any provision of the accident and sickness policy to the contrary. Nothing in this section shall require coverage of occupational injuries or sicknesses, if occupational injuries or sicknesses are not covered under the terms of the policy without reference to eligibility for workers' compensation benefits;

(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. In accordance with the factors specified in Tenn. Code Ann. § 50-6-102(10)(D), Theraco has shown, by a preponderance of the evidence, that it has a limited degree of control of Contracted Therapists with regard to services provided to patients. Theraco does not schedule appointments, develop plans of care, prescribe the number of patient visits, or determine when a

patient should be discharged. Mr. McEver is a licensed physical therapist and, on some occasions, consults with Contracted Therapists, the evidence does not show that he directed Contracted Therapists in providing services.

4. Contracted therapists determine whether to accept or reject referrals, schedule patient visits, develop an individual plan of care for each patient subject to physician approval, and provide services in accordance with Tenn. Code Ann. Title 63, Chapter 13 and Tenn. R. and Regs., Chapter 1150. They make determinations, for example, as to whether a physical therapist assistant will be required or appropriate during a particular course of treatment. They prepare and submit all documentation regarding services to the home health agency.

5. Except for an ultrasound machine provided by Theraco when requested by a physical therapist, Contracted Therapists provide or obtain all equipment used in patient care, such as blood pressure cuff, thermometer, gait belts, oximeter, weights and balance belts.

6. The contract between Theraco and Contracted Therapists can be terminated by either party upon advance notice to the other, and does not require a Contracted Therapists to work exclusively for Theraco.

7. Theraco provides no employee benefits to Contracted therapists. Contracted therapists are responsible for their own professional liability and car insurance as required by home health agencies.

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:

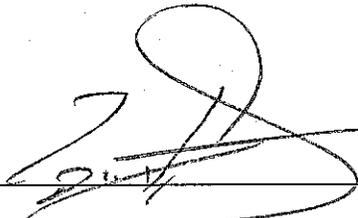
1. Physical therapists, physical therapy assistants, and other therapists contracting with Theraco to provide therapy services on referral should be considered independent contractors rather than employees in accordance with Tenn. Code Ann. § 50-6-102(10);

2. Physical therapists, physical therapy assistants, and other therapists contracting with Theraco to provide therapy services on referral should not be included in determining whether Theraco is considered an "employer" within the meaning of Tenn. Code Ann. § 50-6-102(11); and

3. Theraco does not owe additional premium to CNA or Travelers based on the fee-for-service payments to physical therapists, physical therapy assistants, and other therapists contracting with Theraco.

4. Costs of this proceeding are assessed against the Respondents, CNA and Travelers.

This Final Order is entered and effective this the 18 day of MARCH, 2010.



Larry C. Knight, Jr.  
Assistant Commissioner of Insurance

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 19, day of MARCH, 2010.



Thomas G. Stovall, Director  
Administrative Procedures Division

CERTIFICATE OF SERVICE

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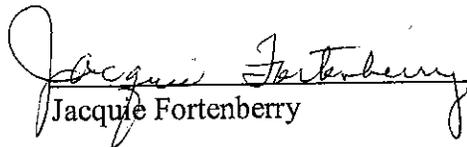
This is to certify that a true and exact copy of the Notice of Hearing has been mailed by certified mail, postage-prepaid, return receipt requested to the following:

Receipt No. 7005 0390 0004 5662 8784  
Ben Rose, Esq.  
Cornelius and Collins, LLP  
511 Union Street, Suite 1500  
Nashville, TN 37219

Receipt No. 7005 0390 0004 5662 8791  
Laurenn S. Disspayne  
Manier & Herod  
150 Fourth Avenue N., Suite 2200  
Nashville, TN 37219-2494

Receipt No. 7005 0390 0004 5662 8777  
Kim Zersen, Assistant Vice President  
Aon Risk Services  
11213 Davenport Street, Suite 201  
Omaha, Nebraska 68154-2604

This the 22nd day of March, 2010.

  
Jacquie Fortenberry

## **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.