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

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2013 JUL -8 PM 3:42
SECRETARY OF STATE

IN THE MATTER OF	)	
BC DEVELOPERS, LLC	)	
	)	**Doc. No.: 12.28-117035A**
and	)	
	)	**WC Appeal - Insurance**
CINCINNATI INSURANCE COMPANY	)	

FINAL ORDER

This matter was heard on February 25, 2013, before The Honorable Stephen Riley Darnell, appointed by the Secretary of State, with Chlora Lindley-Myers, Deputy Commissioner, sitting as Designee of the Commissioner of Commerce and Insurance. As the Commissioner's Designee, Ms. Lindley-Myers makes the final determination as to Findings of Facts and Conclusions of Law in this matter. The Petitioner, BC Developers, LLC, ("BCD") was represented at the hearing by Attorney L. Gilbert Anglin. Cincinnati Insurance Company ("Cincinnati") was represented by Attorney Ben M. Rose.

JURISDICTION

The Commissioner of the Department of Commerce and Insurance for the State of Tennessee ("Commissioner") has jurisdiction over this matter pursuant to TENN. CODE ANN. § 56-5-309(b) (2006), 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 subject of this hearing was: (1) whether the BCD workers' compensation policy, issued by Cincinnati, was subject to additional liability based on the work performed by the subcontractor, G & W Builders ("G & W"); (2) whether the workers' compensation insurance certificates submitted by G & W to BCD were satisfactory evidence that G & W had workers' compensation insurance in force; (3) whether the National Council on Compensation Insurance ("NCCI") project class code 5645 is the appropriate code for residential builders such as BCD and its subcontractor, G & W; and, based on such determination, (4) whether BCD owes additional premiums in the amount of Seventeen Thousand Four Hundred Fifty-two dollars ($17,452.00) based on the remuneration paid to G & W during the September 18, 2010 to September 18, 2011 policy period in which the workers' compensation insurance policy issued by Cincinnati was in effect.

Upon consideration of the entire record, it is determined that: (1) the workers' compensation policy issued by Cincinnati to BCD was subject to additional liability based on the work of the subcontractor, G & W; (2) The workers' compensation insurance certificates submitted by G & W to BCD were not satisfactory proof of the existence of in force workers' compensation insurance; (3) NCCI project class code 5645 was the appropriate code assigned to BCD and G & W; and (4) BCD owes additional premiums in the amount of Seventeen Thousand Four Hundred Fifty-two dollars ($17,452.00) based on the remuneration paid to G & W during the September 18, 2010 to

September 18, 2011 policy period in which the workers' compensation insurance policy issued by Cincinnati was in effect.

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

FINDINGS OF FACT

1. BCD is a business entity created in 2007 by Jerry Butler and its managing member, Michael Colvin.

2. BCD was originally created to develop building lots. In or about 2009, BCD began building homes for sale.

3. BCD used Raborn Insurance Agency, Inc. ("Raborn") in Smyrna, Tennessee for its insurance needs.

4. Once BCD began building homes, Raborn recommended that BCD obtain workers' compensation insurance. Raborn procured the workers' compensation policy for the policy year September 18, 2010 to September 18, 2011 through the Tennessee Workers Compensation Insurance Plan ("TWCIP"). The policy was assigned to Cincinnati by the TWCIP.

5. Cincinnati and Travelers Indemnity Company ("Travelers") have a contractual relationship whereby Travelers provides underwriting, policy issuance, auditing and accounting services for Cincinnati related to insureds like BCD under the TWCIP.

6. BCD's policy was mailed to BCD and Raborn. BCD disputes receiving its copy of the policy because of a faulty address. Mr. Colvin, on behalf of BCD, testified that he knew the BCD policy was with Cincinnati due his regular payment of premiums.

7. Mr. Colvin testified that he understood that if there was a workplace injury to one of G & W's subcontractors, and G & W did not have its own workers' compensation coverage, BCD would be responsible for the injury. (Transcript at p. 68, l. 18-22).

8. After expiration of the policy period, Travelers requested that BCD complete a voluntary audit pursuant to the BCD policy. The voluntary audit was mailed to BCD by Travelers and returned by BCD.

9. Travelers deemed the information received from BCD to be incomplete. Travelers then conducted an estimated audit which generated an invoice sent to BCD.

10. Once the invoice was received by BCD, Mr. Colvin provided additional information, including certificates of workers' compensation insurance for G & W.

11. Travelers reviewed the information, including the certificates of insurance, and determined that G & W did not have workers' compensation coverage for ten (10) months of the BCD policy period. As a result, Travelers determined that the BCD policy had additional exposure for this period of time.

12. Additional testimony given by the owner of G & W, Ricky Goad, substantiated that neither G & W nor any of its subcontractors maintained workers' compensation throughout the BCD policy period.

13. During the time of the audit process, BCD did not provide Travelers with any payroll records. Travelers used an Internal Revenue Service ("IRS") Form 1099, submitted by BCD, to calculate the additional premiums.

14. Using the 1099 form, Travelers pro-rated the amount of premium owed by BCD during the ten (10) months of the policy period that G & W was without coverage. This action resulted in another invoice being sent to BCD.

15. In addition to the 1099 form, BCD provided Travelers handwritten checks from BCD to G & W. Each check written to G & W contained the letters "M & L" in the "for" blanks which Mr. Colvin stated meant "materials and labor." (Transcript at p. 136, l. 20-25).

16. BCD did not provide any evidence of material expense related to the amounts paid to G & W for labor expense.

17. Premium basis and payroll allocation under BCD's policy is controlled by NCCI Rule 2 H-1- Payroll Basis and Payroll Allocation. (Exhibit 13).

18. The NCCI Rule provides, in pertinent part:

> [T]he contractor must furnish satisfactory evidence that the subcontractor has workers compensation insurance in force covering the work performed for the contractor. The following documents may be used to provide satisfactory evidence:
>
> - Certificate of insurance for the subcontractor's workers compensation policy
> - Certificate of exemption
> - Copy of the subcontractor's workers compensation policy. (Exhibit 13).

19. BCD provided certificates of worker's compensation insurance for G & W; however, the certificates were only in force for two months during the policy period.

20. The NCCI Rule 2-H-2 provides that additional premiums must be charged in accordance with two (2) subcontractor tables. The tables provide that, if the contractor "furnishes complete payroll records of the subcontractor's employees," then the insurer

may use the payroll detailed in the records. BCD did not produce any payroll records. (Exhibit 13).

21. The Rule states that if there are no payroll records, the full subcontract price of the work performed during the policy period should be used. BCD produced one contract between BCD and G & W. The contract provided that BCD would pay G & W "for all necessary services and work to be performed regarding the construction of new homes." (Exhibit 1). The general contract between the parties did not speak to a specific amount sufficient to satisfy this part of the Rule.

22. The Rule states that if payroll is not provided and the full subcontract price cannot be determined, other documentation of a specific job discloses a definite amount representing payroll, then these amounts can be used, subject to certain minimums in Table 2. (Exhibit 13).

23. Travelers used the amounts from the checks submitted by BCD to satisfy the third portion of the Rule. For jobs involving labor only, the minimum contained in Table 2 of the Rule provides that no less than ninety percent (90%) of payroll is used to calculate the premium. (Exhibit 13). Travelers applied the *90% payroll rule* [emphasis added] in calculating the amount of premium owed.

24. According to BCD's calculations, the amount of remuneration paid to G & W, during the ten (10) months of the policy period when G & W had no workers' compensation insurance coverage, was Eighty Nine Thousand One Hundred Sixty-nine dollars ($89,169.00).

25. Travelers calculated a lesser amount using the ten percent (10%) reduction in the NCCI payroll rule. The amount was Eighty Six Thousand Two Hundred Twelve dollars ($86,212.00)

26. NCCI Code 5645 was applied by Travelers to BCD and G & W when calculating the premium owed.

27. NCCI Code 5645 is the project class code for carpentry performed in residential construction. It 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.

28. Travelers determined that BCD owed Seventeen Thousand Four Hundred Fifty-two dollars ($17,452.00) in additional premiums.

29. BCD disputed Travelers' determination and appealed to the administrator of the Tennessee Workers' Compensation Insurance Plan. The administrator affirmed Travelers' determination, prompting this appeal to be filed with the Department of Commerce and Insurance.

CONCLUSIONS OF LAW

1. Pursuant to TENN. COMP. R. & REGS. 1360-4-1-.02(7), the Petitioner, BCD, 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. While BCD contends that it did not receive a copy of the workers' compensation policy, there is no dispute that a copy of the policy was also sent to BCD's insurance agent, Raborn Insurance Agency, Inc. Mr. Colvin also testified that he knew BCD's policy was with Cincinnati from the premium checks he paid on behalf of BCD. Moreover, in the absence of fraud or mistake "an insured cannot claim that he is not bound by the contract of insurance, or certain provisions thereof, because he has not read it, or is otherwise ignorant of, or unacquainted with its provisions." *CNA v. King*, 2006 WL 2792159 at *5 (Tenn. Ct. App., Sept. 28, 2006) (quoting *Webber v. State Farm Mutual Auto Insurance Company*, 49 S.W.3d 265, 274 (Tenn. 2001)).

3. This matter involves prior term premiums for a workers' compensation insurance policy between BCD and Cincinnati under the TWCIP. As such, the insured employer, BCD, has the burden to establish that the employee in dispute, G &W, should be excluded from the prior term premium calculation. *American Zurich Insurance Company v. MVT Services, Inc.*, 2012 WL 3064650 at *11 (Tenn. Ct. App. July 27, 2012).

4. TENN. CODE ANN. § 50-6-113 (2010) provides in pertinent part as follows:

> (a) A principal 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 principal contractor, intermediate contractor or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.
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> ****
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> (d) This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or that are otherwise under the principal contractor's control or management.

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5. TENN. CODE ANN. § 50-6-113 (2010) is said to create "statutory employers" in situations where an injured worker cannot recover compensation from an immediate employer. The purpose is "to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation for their workers." *CNA* at *5 (citing *Murray v. Goodyear Tire & Rubber Co.* 46 S.W.3d 171, 175 (Tenn. 2001) (quoting *Brown v. Canterbury Corp.*, 844 S.W.2d 134, 136 (Tenn. 1992)).

6. BCD has failed to satisfy the burden of proof that G & W should be excluded from the retrospective premium calculation. G & W's lack of in force workers' compensation insurance coverage for the ten (10) months of the policy year resulted in the BCD policy being subject to additional exposure of risk.

7. Tennessee's assigned risk program is administered by Aon. However, NCCI, the designated rating organization, makes general rules, classifications and rating rules for workers' compensation insurance. *See American* at *2.

8. Premium basis and payroll allocation under the BCD policy is controlled by NCCI Rule 2- Payroll Basis and Payroll Allocation. Travelers' use of the NCCI Rule was appropriate and not contrary to the provisions of the BCD policy.

9. NCCI Code 5645 is the appropriate project class code for residential builders like BCD and G & W. Travelers' use of this code was appropriate for the additional premium calculation.

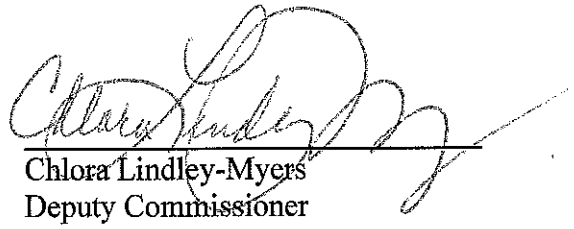
10. TENN. COMP. R. & REGS. 0780-1-82-10(2)(g) provides that "orders issued under. . . this Rule shall assign the costs of the appeal, in the commissioner's discretion, to the non-prevailing party."

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

1. The BCD policy was subject to additional risk and corresponding premium due to the lapse in workers' compensation coverage of the BCD subcontractor, G & W;

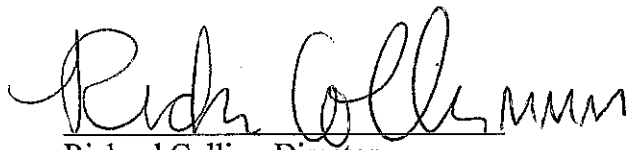
2. BC Developers, LLC shall pay additional premiums to Cincinnati Insurance Company in the amount of Seventeen Thousand Four Hundred Fifty-two dollars ($17,452.00) for the policy period of September 18, 2010 to September 18, 2011; and

3. The cost of this matter shall be taxed against the Petitioner, BC Developers, LLC.



Chlora Lindley-Myers
Deputy Commissioner

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 8, day of July, 2013.



Richard Collier, 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. 0780-01-82-.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.

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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.

(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 has been served upon the following:

L. Gilbert Anglin, Esq.
1535 West Northfield Boulevard
Murfreesboro, TN 37129

Ben M. Rose
The Law Offices of Ben M. Rose, PLLC
P. O. Box 1108
Brentwood, TN 37024

By depositing same into the United States Mail enclosed in an envelope with adequate postage affixed thereon.

This the 8th day of July, 2013.

Jacquie Fortenberry

Jacquie Fortenberry