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

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IN THE MATTER OF:	)	
	)	
PETER J. BUSH d/b/a BUSH BUILDERS	)	
	)	**Docket No. 12.28-119526A**
and	)	**WC Appeal - Insurance**
	)	
HOME BUILDERS ASSOCIATION OF TENNESSEE SELF-INSURED TRUST	)	
	)	

FINAL ORDER

This matter was heard on December 17, 2012, before the Honorable Kim Summers, Administrative Law Judge, appointed by the Secretary of State, with Chlora Lindley-Myers, Assistant Commissioner for Policy, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner's Designee, Ms. Lindley-Myers makes the final determination as to the findings of fact and conclusions of law in this matter. The Petitioner, Peter J. Bush doing business as Bush Builders ("Bush Builders"), represented himself at the hearing. Respondent Home Builders Association of Tennessee Self-Insured Trust ("HBATSIT") was represented by Attorney Tom White. HBATSIT's third-party administrator, Brentwood Services Administrators, was represented by Attorney G. Everett Sinor, Jr.

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 subject of the hearing was: (1) whether Bush Builders is responsible for workers' compensation insurance of five subcontractors it engaged for residential construction projects during the January 1, 2011-January 1, 2012 coverage period which were sole proprietors, did not have workers' compensation coverage and were not listed on the workers' compensation exemption registry with the Secretary of State and, based on such determination; (2) whether Bush Builders owes additional premium for workers' compensation of such subcontractors in the amount of four hundred twenty five dollars ($425).

Upon consideration of the record, it is determined that: (1) Bush Builders is responsible for the workers' compensation insurance coverage through the HBATSIT plan for the five uninsured subcontractors it engaged during the January 1, 2011-January 1, 2012 coverage period; and (2) Bush Builders owes additional premium in the amount of four hundred twenty five dollars ($425) to HBATSIT for such coverage.

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

FINDINGS OF FACT

1. Peter J. Bush doing business as Bush Builders was at all times relevant engaged as a general contractor in the construction industry.

2. Bush Builders obtained workers' compensation coverage through the Home Builders Association of Tennessee Self-Insured Trust ("HBATSIT") under Policy No. 00187 for the period January 1, 2011 through January 1, 2012 (the "Coverage Period").

3. Brentwood Services Administrators ("Brentwood Services"), a subsidiary of Brentwood Services, Inc., is the third party administrator of HBATSIT.

4. Bush Builders employed five regular employees and engaged a variety of subcontractors for construction work that were paid on a 1099 basis during the Coverage Period.

5. Five of the subcontractors engaged by Bush Builders during the Coverage Period did not have their own workers' compensation insurance coverage and had no proof of an exemption filed with the workers' compensation registry pursuant to Tenn. Code Ann. § 50-6-903.

6. Bush Builders is a "construction services provider" as such term is defined in Tenn. Code Ann. § 50-6-901(5).

7. On May 18, 2012, an annual audit of the Bush Builder workers' compensation coverage was conducted on behalf of HBATSIT which determined that five of the subcontractors engaged by Bush Builders during the Coverage Period should be considered employees for purposes of determining premium.

8. Bush Builders was billed additional premium in the amount of four hundred twenty five dollars ($425) by Brentwood Services based on the annual audit for the Coverage Period and amounts paid to the five subcontractors.

9. Bush Builders timely filed an appeal with the Department of Commerce and Insurance on September 27, 2012.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. & Regs. 1360-4-1-.02(7), the Petitioner, Bush Builders, 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 employees legal representatives, dependents and other persons to whom compensation may be payable under this chapter;

* * * *

(E) "Employee" does not include a construction services provider, as defined in § 50-6-901, if the construction services provider is:

(i) Listed on the registry established pursuant to part 9 of this chapter as having a workers' compensation exemption and is working in the service of the business entity through which the provider obtained such an exemption;

(ii) Not covered under a policy of workers' compensation insurance maintained by the person or entity for whom the provider is providing services; and

(iii) Rendering services on a construction project that:

(a) Is not a commercial construction project, as defined in § 50-6-901; or

(b) Is a commercial construction project, as defined in § 50-6-901, and the general contractor for whom the construction services provider renders construction services complies with § 50-6-914(b)(2);

* * * *

3. Tenn. Code Ann. § 50-6-901 provides in pertinent part as follows:

50-6-901. Part definitions.

For purposes of this part, unless the context otherwise requires:

* * * *

(4) "Construction project" means the construction, erection, remodeling, repair, improvement, alteration or demolition of a building, structure or other undertaking; provided, that if a general contractor contracts to erect, remodel, repair, improve, alter or demolish multiple buildings, structures or undertakings in one (1) contract, all such

buildings, structures or undertakings described in such contract shall constitute one (1) construction project;

(5) "Construction services provider" or "provider" means any person or entity engaged in the construction industry;

* * * *

(8) "Engaged in the construction industry" means any person or entity assigned to the contracting group as those classifications are designated by the rate service organization designated by the commissioner of commerce and insurance as provided in § 56-5-320; provided, that where more than one (1) classification applies, the governing classification, as that term is defined by the rate service organization designated by the commissioner of commerce and insurance as provided in § 56-5-320, shall be used to determine whether the person or entity is engaged in the construction industry;

* * * *

(10) "General contractor" means the person or entity responsible to the owner or developer for the supervision or performance of substantially all of the work, labor, and the furnishing of materials in furtherance of the construction, erection, remodeling, repair, improvement, alteration or demolition of a building, structure or other undertaking and who contracts directly with the owner or developer of the building, structure or other undertaking; "general contractor" includes a prime contractor;

* * * *

(16) "Registry" means the construction services provider workers' compensation exemption registry established pursuant to this part and maintained by the secretary of state; and

(17) "Sole proprietor" means one (1) person who owns a form of business in which that person owns all the assets of such business.

4. Tenn. Code Ann. § 50-6-902 provides as follows:

50-6-902. Requirement that construction services providers carry workers' compensation insurance -- Exemptions -- Election by subcontractor.

(a) Except as provided in subsection (b), all construction services providers shall be required to carry workers' compensation insurance on themselves. The requirement set out in this subsection (a) shall apply whether or not the provider employs fewer than five (5) employees.

(b) To the extent there is no restriction on applying for an exemption pursuant to § 50-6-903, a construction services provider shall be exempt from subsection (a) if the provider:

(1) Is a construction services provider rendering services on a construction project that is not a commercial construction project and is listed on the registry;

(2) Is a construction services provider rendering services on a commercial construction project, is listed on the registry and

such provider is rendering services to a person or entity that complies with § 50-6-914(b)(2);

(3) Is covered under a policy of workers' compensation insurance maintained by the person or entity for whom the provider is providing services;

(4) Is a construction services provider performing work directly for the owner of the property; provided, however that this subdivision (b)(4) shall not apply to a construction services provider who acts as a general or intermediate contractor and who subsequently subcontracts any of the work contracted to be performed on behalf of the owner;

(5) Is a construction services provider building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the construction service provider's own property; or

(6) Is a provider whose employment at the time of injury is casual as provided in § 50-6-106.

(c) A subcontractor engaged in the construction industry under contract to a general contractor engaged in the construction industry may elect to be covered under any policy of workers' compensation insurance insuring the general contractor upon written agreement of the general contractor, regardless of whether such subcontractor is on the registry established pursuant to this part, by filing written notice of the election, on a form prescribed by the commissioner of labor and workforce development, with the department. It is the responsibility of the general contractor to file the written notice with the department. Failure of the general contractor to file the written notice shall not operate to relieve or alter the obligation of an insurance company to provide coverage to a subcontractor when the subcontractor can produce evidence of payment of premiums to the insurance company for the coverage. The election shall in no way terminate or affect the independent contractor status of the subcontractor for any other purpose than to permit workers' compensation coverage. The election of coverage may be terminated by the subcontractor or general contractor by providing written notice of the termination to the department and to all other parties consenting to the prior election. The termination shall be effective thirty (30) days from the date of the notice to all other parties consenting to the prior election and to the department.

(d) Nothing in this part shall be construed as exempting or preventing a construction services provider from carrying workers' compensation insurance for any of its employees. The requirement set out in this subsection (d) shall apply whether or not the provider employs fewer than five (5) employees.

5. 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.

* * * *

(e) This section applies only in cases where the injury occurred on, in, or about the premises on which the general contractor has undertaken to execute work or that are otherwise under the general contractor's control or management.

6. The Petitioner, Bush Builders, has failed to show by a preponderance of the evidence that it should not be responsible for the workers compensation coverage of the five uninsured subcontractors it engaged during the Coverage Period which were not listed on the workers' compensation exemption registry. Petitioner makes a number of arguments which, though based on reasonable inferences drawn from various provisions of the Tennessee Workers' Compensation Law, Tenn. Code Ann. § 50-6-101, et seq., do not support the conclusion that the five uninsured subcontractors should not be considered "employees" of Bush Builders or that Bush Builders is not responsible for workers' compensation coverage of its subcontractors if such subcontractors fail to obtain their own coverage or file for an exemption.

7. The parties agree that Bush Builders, and each of the subcontractors, meets the definition of a "construction services provider" ("CSP") set forth in Tenn. Code Ann. § 50-6-901(5). The parties also agree that all of the conditions specified in Tenn. Code Ann. § 50-6-102(10)(E), including being listed on the workers' compensation exemption registry, must be met in order for a CSP to not be considered an "employee." Petitioner contends that, in addition to the conditions set forth in such provision, each CSP must also both elect to be considered an employee and have workers' compensation insurance coverage before liability of the general contractor can be established. In making this argument, Petitioner cites Tenn. Code

Ann. § 50-6-902(c), which provides that "[a] subcontractor engaged in the construction industry under contract to a general contractor engaged in the construction industry may *elect* to be covered under any policy . . .", and Tenn. Code Ann. § 50-6-102(10)(B), which defines "employee" to include a sole proprietor "who . . . *elects* to be included in the definition of employee . . . ." (Emphasis supplied.) Petitioner also notes that Tenn. Code Ann. § 50-6-914(a) appears to address the liability of a general contractor for compensation for injured employees of a subcontractor, but not that of a general contractor for compensation for a subcontractor which is a sole proprietor. The provisions cited by Petitioner do not, however, specifically reference or otherwise limit the applicability of Tenn. Code Ann. § 50-6-102(10)(E), and neither provides a separate specific exception which would result in a CSP not being considered an employee. Tenn. Code Ann. § 50-6-902(c) preserves the right of a general contractor and subcontractor to agree for subcontractor to be covered under a general contractor's policy. Tenn. Code Ann. § 50-6-102(10)(B) provides that a sole proprietor or partner may elect to be included under the same workers' compensation insurance coverage as the subcontractor's employees, but such provision does not operate to prevent sole proprietors or partners from being considered employees simply because a subcontractor has no employees.

8. Petitioner further argues generally that, since Tenn. Code Ann. § 50-6-902(a) requires all CSPs to carry workers' compensation insurance unless they obtain an exemption made available under § 50-6-902(b), Petitioner should not be penalized for the failure of its five subcontractors to meet requirements, either obtain coverage or file for an exemption, which are generally applicable to all CSPs. Such arguments are not unreasonable, but they do not alter the fact that, under Tenn. Code Ann. § 50-6-914(a), a general contractor may be responsible for uninsured subcontractors which are not listed on the exemption registry, regardless of whether

such subcontractors have their own employees. The five uninsured subcontractors of Bush Builders could, therefore, have been considered employees of Bush Builders in the event any one of them sustained a work-related injury during the Coverage Period and, HBATSIT, as Bush Builders' insurer, would have been ultimately responsible for the expenses based on such liability.

9. Tenn. Comp. R. & Regs. 0780-1-82-10(2) (g) 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**:

1. Bush Builders is responsible for workers' compensation coverage of the five subcontractors it engaged during the January 1, 2011-January 1, 2012 Coverage Period which did not obtain their own workers' compensation insurance coverage and did not provide proof of an exemption filed with the workers' compensation registry pursuant to Tenn. Code Ann. § 50-6-903;

2. Bush Builders shall pay additional premium to HBATSIT in the amount of four hundred twenty five dollars ($425) within sixty (60) days of this Order; and

3. The costs of this matter shall be taxed against the Petitioner, Bush Builders.

Chlora Lindley-Myers
Assistant Commissioner for Policy

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 2nd, day of April, 2013.

Thomas G. Stovall

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. 0780-01-82-.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

A copy of the within and foregoing document has been served upon,

Peter J. Bush, Sole Proprietor/Owner
Bush Builders
3760 Sugar Camp View
Sevierville, TN 37862

Thomas V. White, Esq.
Tune, Entrekin & White, P.C.
Regions Center, Suite 1700
315 Deaderick Street
Nashville, TN 37238-1700

G. Everett Sinor, Jr., Esq.
Brentwood Services, Inc.
104 Continental Place, Suite 200
Brentwood, TN 37024

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

This the 3rd day of April, 2013.

Jacquie Fortenberry

Jacquie Fortenberry