IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

PETER J. BUSH d/b/a/ BUSH BUILDERS, Plaintiff/Petitioner, v. HOME BUILDERS ASSOCIATION OF TENNESSEE SELF-INSURED TRUST; STATE OF TENNESSEE, DEPARTMENT OF COMMERCE AND INSURANCE, Defendants/Respondents.	)	FOTT No. 13-701-IV

MEMORANDUM AND ORDER

Pursuant to Tenn. Code Ann. § 4-5-322,[1] the Petitioner, Peter Bush, challenges an agency decision requiring him, as a sole proprietor general contractor, to pay $425 in additional workers' compensation insurance premiums for five non-exempt sole proprietor subcontractors who did not separately obtain workers' compensation insurance. The Plaintiff timely sought judicial review under the Administrative Procedures Act. The Court heard oral argument on December 6, 2013.

Summary of the Facts

The Petitioner, Peter J. Bush, does business as Bush Builders and was at all times relevant engaged as a general contractor in the construction industry. His company, Bush Builders, obtained workers' compensation coverage through the Defendant, Home Builders

[1] The Petition is captioned "Petition for Writ of Certiorari and Supersedeas," but the body of the Petition specifically seeks judicial review pursuant to Tenn. Code Ann. §4-5-322. In the Commissioner's Response, she states that the hearing was conducted as a contested case under the Uniform Administrative Procedures Act, Tenn. Code Ann. §4-5-301, *et seq.*, and that the Secretary of State's Rules of Procedure were used. *See* Tenn. Comp. R. & Regs. 0780-01-82-.08(1). Accordingly, the Court conducts its review pursuant to this statute and the adopted rules and not as a Writ of Certiorari.

Association of Tennessee Self-Insured Trust ("the Association") under Policy No. 00187 for the period January 1, 2011 through January 1, 2012 ("the Coverage Period"). Brentwood Services Administrators, a subsidiary of Brentwood Services, Inc. is the third party administrator. During the Coverage Period, Bush Builders employed five regular employees and engaged a variety of subcontractors who were paid on a 1099 basis for construction work.

Five of the subcontractors engaged by Bush Builders during the Coverage Period did not have workers' compensation coverage and had no proof of an exemption filed with the workers' compensation registry as required by statute.[2] On May 18, 2012, the Association conducted an annual audit of Bush Builders' workers and determined that those five subcontractors should be considered employees for purposes of determining Bush Builders' workers' compensation premium. Brentwood Services, as the administrator, billed Bush Builders $425 as an additional premium based upon the annual audit for the Coverage Period and the amounts paid to the subcontractors. Bush Builders objected to the additional premium and timely filed an appeal with the Defendant Tennessee Department of Commerce and Insurance ("the Department") on September 27, 2012.

Procedural Background

Thereafter, on December 17, 2012, the administrative law judge ("ALJ") conducted a non-evidentiary hearing[3] based solely upon the arguments of the parties. She issued her Final

2. Tenn. Code Ann. §50-6-903.

3. On appeal, the Petitioner claims for the first time in his Reply Brief that the ALJ failed to swear in the witnesses pursuant to Tenn. Code Ann. §4-5-301(b). The Petitioner filed a motion for summary judgment. As stated in the Petitioner's Brief, all parties agreed to a Summary Judgment hearing, hence there were no witnesses who needed to take an oath. Second, had there been witnesses, an objection to testimony on the grounds that the witness was not sworn must be promptly made. If no objection is made, the failure to swear in the witness cannot be raised in a motion for a new trial or on appeal. Trial Handbook for Tenn. Lawyers §11:11, Swearing the witness (*citing Moore v. State*, 96 Tenn. 209, 33 S.W.1046 (1896) and Tenn. Code Ann §24-3-105).

Order on April 2, 2012.[4] On April 9, 2013, the Petitioner filed his Petition for Stay and Reconsideration, the Defendants responded on April 16, 2013 and the Petitioner replied on April 17, 2012. On May 1, 2013, the Commissioner's Designee denied the stay and reconsideration request. On May 14, 2013, the Petitioner filed for judicial review in Chancery Court.

Standard of Review

Judicial review of a decision by an administrative agency following a contested case hearing is governed by the Tennessee Uniform Administrative Procedures Act. Tenn. Code Ann. § 4-5-322(a)(1). In reviewing the decision of an administrative agency or commission, the Court does not sit as a trial court and does not consider the record *de novo*. Rather, review of this case is proper under Tenn. Code Ann. §4-5-322(h). The Court may not substitute its judgment for that of the commission, even when the evidence could support a different result. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988).

Pursuant to Tenn. Code Ann. §4-5-322(h), this court may reverse or modify the commission's decision only if Petitioner's rights have been prejudiced because the commissioner's decision is:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of an agency;

(3) made upon unlawful procedure;

(4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) unsupported by evidence which is both substantial and material in light of the entire record.

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4. On appeal, the Petitioner also claims for the first time that the Commissioner's Designee issued the Final Order 106 days after the hearing, instead of within the 90-day window required by Tenn. Code Ann. §4-5-314(g). The Tennessee Supreme Court has held that the administrative statute that requires rendering a final order within 90 days after the conclusion of an administrative law judge's hearing is directory, rather than mandatory, and thus, the administrative law judge's failure to comply with the 90-day rule did not nullify the hearing or the order. *Garrett v. State Department of Safe*ty, 717 S.W.2d 290, 291 (Tenn. 1986).

Id. No agency's decision in a contested case shall be reversed, remanded or modified unless for errors which effect the merits of the decision. Tenn. Code Ann. §4-5-322(i).

In determining whether the agency's decision is based on substantial and material evidence, this Court must determine if the record of the proceedings contains "such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Clay County Manor, Inc. v. State,* 849 S.W.2d 755, 759 (Tenn. 1993)(quoting *Southern Railway Co. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984). The court may not reweigh the evidence, and the agency's decision need not be supported by a preponderance of the evidence. *McClellan v. Board of Regents*, 921 S.W.2d 684, 693 (Tenn. 1996); *Humana of Tennessee v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn. 1977); *Street v. State Bd. Of Equalization*, 812 S.W.2d 583, 585-86 (Tenn. Ct. App. 1990). An agency's decision is arbitrary and capricious if it is not based on any course of reasoning or exercise of judgment, or if there is a clear error in judgment. Tenn. Code Ann. §4-5-322(h)(4); *Jackson Mobilphone Co., Inc. v. Tennessee Pub. Serv. Comm'n,* 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993).

Issue Presented and Applicable Regulations

The Petitioner has raised a number of issues, although his chief dispute is that the Commissioner's Designee erred in holding that the five subcontractors were classified as his employees for purposes of the workers' compensation act, that she erred in analyzing and interpreting Tenn. Code Ann. §50-6-102(10)(B) and (E) and Tenn. Code Ann. §50-6-914(a) and erred in upholding the additional premium. He contends that the five employees are Construction Service Providers ("CSP") as defined in the statute, that they have the burden of carrying their own workers' compensation coverage and that he is relieved of any obligation to

pay for their coverage. He complains that the requirements of Tenn. Code Ann. §4-5-312 were not upheld because he was not advised of his rights to reconsideration[5] and he asks that all costs be assessed against the Defendants pursuant to Tenn. R. & Reg. 0780-1-82-.10(2)(g). Finally, he asks for an award for his expenses, including court costs, pursuant to provisions of the Equal Justice Act, Tenn. Code Ann. §29-37-104.[6]

As previously stated, the parties submitted this matter on summary judgment to the ALJ. After oral argument, she was required to analyze the definition of "employee" as set out in Tenn. Code Ann. §50-6-102(10)(A) and (E), which states as follows:

> (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;
>
> and
>
> (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

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5. As a general rule, every citizen is presumed to know the law. *Burks v. Elevation Outdoor Adver., LLC*, 220 S.W.3d 478, 492 (Tenn. Ct. App. 2006). Tenn. Code Ann. §4-5-317(a) RECONSIDERATION states:

> (a) Any party, within fifteen (15) days after entry of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. However, the filing of the petition shall not be a prerequisite for seeking administrative or judicial review.

Further, courts should not allow *pro se* litigants to shift the burden of the litigation to the courts or to their adversaries. *Hessmer v. Miranda*, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003). The Petitioner improperly attempted to shift his duty to know the law upon the ALJ or the Commissioner's Designee. The Petitioner is entitled to no relief on this issue.

6. This issue is without merit. The Petitioner failed to assert this claim in either his initial Petition or his amendment and it arises solely in his brief. Claims for relief are not raised in memoranda. Further, Tenn. Code Ann. §29-37-105(6) specifically exempts proceedings required by state law. The underlying action was a grievance hearing, a proceeding mandated **by state law** which requires every insurer and rate service organization to provide any aggrieved person an opportunity to be heard. Tenn. Code Ann. §56-5-309(b) and (c)(emphasis added).

> of the business entity through which the provider obtained such an exemption;
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> (ii) Not covered under a policy of workers' compensation insurance maintained by the person or entity for whom the provider is providing services; and
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> (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);

Id (emphasis added).

Tenn. Code Ann. § 50-6-901 defines a construction service provider as follows:

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

Tenn. Code Ann. § 50-6-901(5).

Discussion

As a basic premise, Tennessee workers' compensation statutes are construed liberally to promote and to adhere to the strong public policy of protecting workers entitled to benefits. *Lindsey v. Smith & Johnson, Inc.*, 601 S.W.2d 923, 925 (Tenn. 1980). Public policy also favors encouraging employers to hire responsible, insured contractors. *Lindsey v. Trinity Communications, Inc.*, 275 S.W.3d 411, 420 (Tenn. 2009). In light of public policy and the complaint raised by the Petitioner, the ALJ was required to construe the language of the above cited statutes and to determine whether the Department properly classified the five CSPs as his employees and whether the assessment of the additional premium was correct under the law.

In *Seals v. H & F, Inc.*, 301 S.W.3d 237 (Tenn. 2010), the Tennessee Supreme Court reiterated that issues of statutory construction are questions of law. *Id.* at 242. Justice Wade stated that when interpreting a statute, the Court "must first ascertain and then give full effect to

the General Assembly's intent and purpose" in drafting those sections. *Id.* He continued, stating that

> [o]ur chief concern is to carry out the legislature's intent without unduly broadening or restricting the statute. We presume that every word in a statute has meaning and purpose and should be given full effect if so doing does not violate the legislature's obvious intent. When the statutory language is clear and unambiguous, we simply apply its plain meaning. When a statute is ambiguous, however, we may refer to the broader statutory scheme, the history of the legislation, or other sources to discern its meaning. We presume that the General Assembly was aware of its prior enactments and knew the state of the law at the time it passed the legislation.

Id. at 242 (internal citations omitted).

The Petitioner contends that under Tenn. Code Ann. §50-6-901(5), the five uninsured subcontractors were construction service providers ("CSP") and pursuant to Tenn. Code Ann. §50-6-902(a), they were required to carry workers' compensation on themselves. He states that there is no implied responsibility in the law that the general contractor police the statutory provision that a CSP carry insurance, or register as exempt, or otherwise make arrangements for their coverage.

The five subcontractors fall within the statutory definition of CSP. Tenn. Code Ann. §50-6-902(a) states that all CSPs shall be required to carry workers' compensation insurance on themselves, except as provided in subsection (b). However, in order to be exempt from carrying such insurance, a CSP must meet one of conditions set out in Tenn. Code Ann. §50-6-903.[7] In

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7. Tenn. Code Ann. §50-6-903(a) states:

> 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 percent (20%) of such partnership;
> (4) A sole proprietor engaged in the construction industry; or

this case, none of the five subcontractors applied for the exemption, none obtained a certificate of exemption necessary to qualify for the registry and as a consequence, none of them were listed on the exemption registry.[8]

The ALJ examined Tenn. Code Ann. §50-6-901(10)(A), which defined an "employee" to include every person employed in the service of an employer under any contract of hire, written or implied. The ALJ found that this definition of "employee" would not include a CSP if the CSP meets all of the conditions specified in Tenn. Code Ann. § 50-6-102(10)(E), which includes being listed on the workers' compensation exemption registry. However, the ALJ also found that the five employees who qualified as CSPs under Tenn. Code Ann. §50-6-903 failed to be excluded as an "employee" under Tenn. Code Ann. §50-6-102(10)(E) and thus, the ALJ held that the five CSPs were employees of the Petitioner.

The ALJ's rationale upholds the strong public policy that all workers receive compensation when they are injured in the course of employment and that liability may be extended to an intermediate or principal contractor if the workers underneath them are not insured. *Lindsey v. Trinity Communications, Inc.*, 275 S.W.3d at 420. In *Lindsey*, the Tennessee Supreme Court affirmed a trial court's finding that an injured worker was an employee of the subcontractor. The Court then turned to the question of whether the principal contractor was the statutory employer of the injured worker under Tenn. Code Ann. §50–6–113:

> Section 50–6–113(a) provides:
>
> > 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

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(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).

8. Tenn. Code Ann. §50-6-902(a); Tenn. Code Ann. §50-6-905.

> matter of the contract to the same extent as the immediate employer.
>
> The statute is intended to ensure that all workers will receive compensation when they are injured in the course of their employment. Section 50–6–113 extends liability from the employer that does not have workers' compensation insurance to an intermediate or principal contractor that does have coverage, which "prevents employers from contracting out normal work simply to avoid liability for workers' compensation." In addition, this encourages employers to hire responsible, insured subcontractors.

Id at 420 (citations omitted).

The Association properly argues that public policy requires general contractors to hire responsibly and ensure that those who work beneath them have coverage of their own, or are exempt, and that the Petitioner seeks to avoid his own duty to do just that - hire responsibly by ensuring that the five CSPs had coverage before putting them to work. As stated by the Association, placing such a duty on the general contractor makes sense in light of the statutes' goal, because the general contractors are in a position where they may insist that those beneath them comply with the statutes and subcontractors are, in turn, more likely to comply with the requirements of the statutes if they know a general contractor will not hire them when or if they fail to comply.

The Petitioner also argues that the CSP must reach an agreement with him for the CSP to be covered by the Petitioner's insurance. He refers to the language in Tenn. Code Ann §50-6-902(c), which states 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 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.*

Tenn. Code Ann. § 50-6-902(c) (emphasis added). This language is straight-forward and understandable. This statute allows a CSP the discretion to elect coverage with the general contractor, regardless of whether the CSP is on the exemption registry or not. The ALJ found that while Tenn. Code Ann. §50-6-902(c) is one method for a subcontractor to obtain insurance coverage through a principal like the Petitioner, it is neither the sole method nor does it explicitly or implicitly limit the applicability of Tenn. Code Ann. § 50-6-102(10)(E), which states that "employee" does not include a CSP if the CSP meets the three criteria set out in (10)(E).

The ALJ's decision that more than one method exists by which a subcontractor may be covered by the general contractor is consistent with the underlying public policies. If the CSP and the general contractor are required to formally enter into a coverage agreement, the result will be that more workers will be uninsured and unable to gain access to coverage when an injury occurs. The ALJ properly determined that the five CSPs were employees of the Petitioner for purpose of workers' compensation coverage.

Second, the Petitioner contends that the CSPs were sole proprietors who are subject to the mandatory coverage provision of the workers' compensation act. *Royal Insurance Co. v. R& R Drywall, Inc.*, M2002-00791-COA-R3-CV, 2003 WL 21302983 at *2 (Tenn. Ct. App. June 6, 2003). His reliance upon *Royal Insurance* is misplaced. The decision in Royal Insurance relied upon the language in Tenn. Code Ann. § 50-6-113(f), which the legislature repealed in 2010 as noted by the Association in its brief. The Association states that the repeal of this provision suggests the opposite of the conclusion arrived at by the Petitioner, that is, even if the CSP is a sole proprietor, the CSP may still be classified as a statutory employee for purposes of the

workers' compensation laws. The ALJ explained that Tenn. Code Ann. §50-6-102(10)(B) allows a sole proprietor to elect to be included under the same workers' compensation coverage as the subcontractor's employees, but such provision does not operate to prevent sole proprietors from being considered employees simply because a subcontractor has no employees. She further stated that "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 Association explains that the ALJ's decision is consistent with the public policy of ensuring that all CSPs have coverage. The statutory definition of employee, which includes a CSP as a sole proprietor, also allows for a subcontractor to include himself in the coverage he procures for his employees and is not a provision meant to exclude him as a statutory employee. Tenn. Code Ann. § 50-6-102(10)(B). The ALJ properly upheld the Association's assessment of the additional premium.

Finally, the Association points out that it would have been responsible for defending any suit brought by any one of the five CSPs if they had been injured while working for the Petitioner and on that basis alone, the assessment of the additional premium was proper. The Association points to the decision in *Continental Casualty v. King*, M2004-02911-COA-R3-CV, 2006 WL 2792159 (Tenn. Ct. App. Sept. 28, 2006), in which Mr. King claimed he had no employees when he applied for workers' compensation coverage. When he was audited, his records reflected individuals who worked under contract with him or his subcontractors but who were not covered by any workers' compensation policies. He was assessed an additional premium and appealed. The appellate court found that Mr. King could have properly excluded those workers from his policy by either requiring them to obtain a policy of their own, or filling

out an I-8 form that would have put them on the exemption registry. *Id.* at *4. The Court held that the additional premiums were properly assessed based solely on the fact that Mr. King's insurer would have been contractually obligated to defend Mr. King in the event that one of those workers sued for coverage. The same is true for the Petitioner. The ALJ correctly found that the decision imposing the additional premium should be enforced.

Conclusion

Finding no reversible error, the Court AFFIRMS the agency decision requiring the Plaintiff/Petitioner, Mr. Peter J. Bush, doing business as Bush Builders, to pay the additional premium in the amount of $425.00. The Court taxes court costs, for which execution may issue, against Mr. Bush.

IT IS SO ORDERED.

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RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

Deputy Clerk and Master
Chancery Court

1/31/2014
Date