

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

IN THE MATTER OF:)	
)	
LIBERTY MUTUAL INSURANCE GROUP)	Doc. No.:12.01-065500J
and)	
SHAWN JONES MASONRY)	WC Appeal - Insurance

NOTICE

THIS ORDER IS AN INITIAL ORDER RENDERED BY THE DEPARTMENT OF COMMERCE AND INSURANCE.

THIS INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. PARTY FILES A WRITTEN APPEAL OR PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NOT LATER THAN FIFTEEN (15) DAYS AFTER THE ENTRY DATE OF THIS INITIAL ORDER.

2. THE AGENCY FILES A WRITTEN NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN FIFTEEN (15) DAYS AFTER THE ENTRY DATE OF THIS INITIAL ORDER.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION OR NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION AT THE ADDRESS OF:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
312 EIGHTH AVE NORTH
NASHVILLE, TN 37243

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, 615-741-7008 OR 741-2078 OR FAX 741-4472. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

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INITIAL ORDER

This matter came to be heard April 5, 2005, before Steve Darnell, Administrative Judge, assigned by the Secretary of State, along with Larry C. Knight, Assistant Commissioner for Insurance of the Tennessee Department of Commerce and Insurance. Mr. Knight sits as the Commissioner's designee and as such makes the final determination as to findings of fact in this matter. Liberty Mutual Insurance Company was represented at the hearing by Paul Holtrup, Attorney at Law. Shawn Jones Masonry was represented by William Looney, Attorney at Law.

INITIAL ORDER

The subject of this hearing was whether Shawn Jones Masonry's employees that are residents of Kentucky and travel to and from Kentucky to Tennessee for work purposes are to be considered "Tennessee" employees by Liberty Mutual Insurance Company. After consideration of the record in this matter, it is determined that Liberty Mutual Insurance Company failed to prove that these employees of Shawn Jones Masonry are "Tennessee" employees and that it is entitled to collect premium for its exposure. This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Commissioner of the Department of Commerce and Insurance for the State of Tennessee (hereinafter referred to as the “Commissioner”) has her official residence in Nashville, Tennessee at Davy Crockett Tower, Fifth Floor, 500 James Robertson Parkway. The Commissioner has jurisdiction of this matter pursuant to Tenn. Code Ann. § 56-5-309(b).

2. Liberty Mutual Insurance Company (hereinafter referred to as “Liberty Mutual”) is a company that offers insurance in the State of Tennessee. Liberty Mutual currently holds a certificate of authority to sell, among other types of insurance, workers’ compensation insurance in this state.

3. Shawn Jones Masonry is a masonry company that is located primarily in the state of Kentucky, but performs work inside the state of Tennessee.

4. Liberty Mutual provides the statutory workers’ compensation coverage to Shawn Jones Masonry for its Tennessee employees through the Tennessee Workers’ Compensation Insurance Plan. On June 28, 2000, Liberty Mutual was assigned to be the carrier for Shawn Jones Masonry.

5. Liberty Mutual’s audit of Shawn Jones Masonry’s 2002 policy year found that certain Kentucky-resident employees of Shawn Jones Masonry traveled to Tennessee for jobs that took more than five (5) consecutive or nonconsecutive days to complete. Liberty Mutual characterized these Kentucky-resident employees as “Tennessee” employees and assessed Shawn Jones Masonry premium based on such employees’ payroll.

6. Shawn Jones Masonry employs both Kentucky and Tennessee residents for jobs that are located in Tennessee.

7. When Shawn Jones Masonry hires Tennessee residents or has Kentucky residents that are required to stay in Tennessee overnight due to the distance of the jobsite from Kentucky, Shawn Jones Masonry utilizes Liberty Mutual to provide the workers’ compensation coverage.

8. When Shawn Jones Masonry hires Kentucky residents that travel to Tennessee for work and then return to Kentucky in the evenings, Shawn Jones Masonry utilizes a self-insurance fund located in Kentucky to provide the workers' compensation coverage.

9. The guidelines promulgated by the National Council on Compensation Insurance (hereinafter referred to as the "NCCI") state that when a worker crosses state lines for work purposes but returns to their home at night, then the worker should be assigned to their home state for purposes of workers' compensation coverage. The NCCI guidelines permit insurance companies to utilize their own standard in determining whether an employer may be charged for non-resident employees.

10. While alternative standards used by Liberty Mutual were alluded to by counsel for Liberty Mutual, Liberty Mutual failed to introduce evidence that they use a standard different from that suggested by the NCCI, and that a different standard was communicated to Shawn Jones Masonry.

CONCLUSIONS OF LAW

11. Pursuant to Tenn. Code Ann. § 56-5-320, the NCCI is the Commissioner's designated rate service organization for workers' compensation. The NCCI has promulgated guidelines for extra-territorial classification which require that when a worker crosses state lines for work purposes but returns to their home at night, the worker should be assigned to their home state for purposes of determining under what state's laws the workers' compensation coverage is needed.

12. Absent the adoption of a different standard on a form adopted by the insurance company and approved by the Commissioner, insurance companies are required to use the guidelines promulgated by the NCCI.

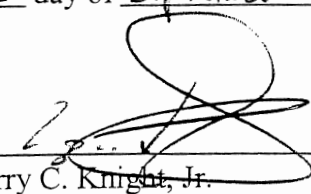
13. Liberty Mutual had the burden of proof to show by a preponderance of the evidence that it was entitled to charge Shawn Jones Masonry premium for the Kentucky-resident employees that returned to Kentucky each day.

14. Based on the guidelines promulgated by the NCCI, Liberty Mutual was not entitled to charge Shawn Jones Masonry premium for those Kentucky-resident workers that returned to Kentucky at the end of each day. As such, Liberty Mutual has failed to carry its burden.

NOW THEREFORE, IN LIGHT OF THE FOREGOING, the following is hereby **ORDERED**:

1. Liberty Mutual shall classify the disputed employees as Kentucky employees for purposes of complying with Tennessee law;
2. Liberty Mutual shall not charge Shawn Jones Masonry premium for such Kentucky employees; and
3. Liberty Mutual shall withdraw its assessment of Shawn Jones Masonry for the 2002 policy year.

This Initial Order is entered and effective this the 22 day of September, 2005.



Larry C. Knight, Jr.
Assistant Commissioner of Insurance

APPENDIX A TO INITIAL ORDER

NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Eighth Avenue N., Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.