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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:)
)
SIDE BY SIDE VINYL SIDING) **Docket No. 12.28-097317A**
) **WC Appeal - Insurance**
and)
)
THE HARTFORD)

FINAL ORDER

This matter was heard on June 26, 2008 in Nashville, Tennessee before the Honorable Margaret R. Robertson, Administrative Law Judge, appointed by the Secretary of State, with John F. Morris, Deputy Commissioner, Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner's Designee, Larry C. Knight, Assistant Commissioner for Insurance, makes the final determination as to Findings of Fact and Conclusions of Law in this matter. The Petitioner, Richard Perigo d/b/a Side by Side Vinyl Siding ("Mr. Perigo" or "Side by Side") was represented at the hearing by Attorney Steven C. Girsky. The Respondent, The Hartford ("Hartford"), was represented by Attorney Benjamin M. Rose.

The subject of the hearing was: (1) whether Hartford correctly determined that two individuals engaged by Side by Side to install vinyl siding, George Helton and Jack Tyra, should be considered "employees" within the meaning of Tenn. Code Ann. § 50-6-102(10), or independent contractors; and (2) whether the premium audit billing issued by Hartford in the amount of \$16,069.00 for the workers' compensation insurance policy (the "Policy") in effect February 26, 2006 through February 26, 2007 (the "Policy Period") was correct.

After consideration of the record, including all relevant testimony, exhibits, and proposed Findings of Fact and Conclusions of Law, it is determined that: (1) George Helton and Jack Tyra should be considered employees of Side by Side during the Policy Period; and (2) the premium audit billing of \$16,069.00 for the Policy was correct and payable. 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 in this matter pursuant to Tenn. Code Ann. § 56-5-309(b).
2. Richard Perigo d/b/a Side by Side Vinyl Siding is engaged in the business of installing vinyl siding in the Clarksville, Tennessee area.
3. On February 23, 2006, Side by Side completed an application for workers compensation coverage under the Tennessee Workers Compensation Insurance Plan ("TWCIP") through Dunn Insurance, Inc. ("Dunn Insurance") and paid the minimum premium of \$771.00. The application indicated that Side by Side did not use any subcontractors in his business.
4. The Hartford is an insurance company incorporated under the laws of Delaware which holds a certificate of authority to sell workers' compensation coverage in the state of Tennessee.
5. Hartford issued Workers' Compensation and Employers Liability Policy Number 6S60UB-7254B88-4-06 (the "Policy") to Side by Side for the period February 26, 2006 through February 26, 2007 (the "Policy Period").
6. Part Five of the Policy includes the following provisions:

B. Classifications

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

C. Remuneration

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

* * * *

E. 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.

* * * *

F. Records

You will keep records of information needed to compute the premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all of your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

7. On April 23, 2007, Hartford sent a "Request to Cancel for Non-Cooperation with Mail Audit ("Request to Cancel") to Aon, with a copy to Side by Side, requesting authorization to cancel the Policy due to Side by Side's failure to comply with the records and audit provisions of the Policy set forth in Paragraph 6, above,

8. On or about March 13, 2007, Side by Side completed, signed and sent to Hartford a Policyholder Audit Report ("Audit Report") detailing the amounts paid to individuals and entities engaged by Side by Side during the Policy Period, as follows:

Name	Type of Work Performed	Amount Paid
George Helton	Siding installation	\$32,067.00
Jack Tyra	Siding installation	24,808.00
Micah Armeto	Metal fabrication	5,585.00
Clarksville Gutter, LLC	Gutter installation	1,650.00

9. Side by Side also provided and provided copies of 1099 forms and a copy of a IRS Schedule C (Form 1040) Profit or Loss From Business form ("Schedule C") showing

payments from Side by Side related to "contract labor" relating to the individuals or entities as set forth in Paragraph 8, above.

10. Upon receiving the Audit Report, Hartford sent a Notice of Cooperation, withdrawing its previous request to cancel the Policy; however, it concluded from the Audit Report and documentation provided by Side by Side that the individuals or entities specified in Paragraph 8, above, were employees, rather than independent contractors and, on May 18, 2007, issued a premium audit adjustment billing in the amount of \$18,026.00

11. On June 19, 2007, Hartford sent a Supplementary Underwriting Information Request to Side by Side, requesting copies of all invoices received from George Helton ("Mr. Helton") and Jack Tyra ("Mr. Tyra") no later than July 9, 2007, and advising that the payroll for Clarksville Gutter LLC of would be removed from the audit.

12. Side by Side agreed to include in the audit the amounts paid to Micah Armato ("Mr. Armato"), as Mr. Armato's workers' compensation policy did not cover him individually.

13. On July 16, 2007, Side by Side provided to Hartford carbon copies of invoices prepared by Mr. Helton and Mr. Tyra intended to represent the amount Side by Side was billed by such individuals for labor during the Policy Period. The invoice documentation was not prepared contemporaneously with the work performed, or during the Policy Period, however, it indicated that Mr. Helton and Mr. Tyra were paid by the square foot, typically worked together as a crew or team on the same worksites, and almost exclusively for Side by Side during the Policy Period. The documentation showed, for example, that: (a) of the 65 job sites at which Mr. Helton performed installation work, 55 were the same as those at which

Mr. Tyra performed similar work; and (b) of the 59 job sites at which Mr. Tyra performed work, 52 were the same as those at which Mr. Helton performed work.

14. On September 10, 2007, Hartford advised that it had concluded its review of the audit findings and, on September 13, 2007, sent Side by Side an adjusted premium bill in amount of \$16,069.00

15. On September 18, 2007, Dunn Insurance sent a letter to Aon Risk Services, Inc. ("Aon") disputing the Hartford audit findings, in response to which Aon requested additional documentation, including: business cards, bids, invoices, advertisements, job estimates, contracts, and certificates of insurance.

16. In response to Aon's request for additional documentation, Side by Side provided copies of:

- (a) a Subcontractor Agreement between Richard Perigo and "Helton and Son," dated October 10, 2005;
- (b) a Subcontractor Agreement between Richard Perigo and "JET Construction" dated January 5, 2005; and
- (c) a copy of a business card bearing the name "Helton and Son."

17. Side by Side also provided Certificates of Liability Insurance for Mr. Tyra and Mr. Helton indicating that such individuals had obtained workers' compensation coverage for their respective employees, if any, and paid the minimum premium amount. However, neither of the workers' compensation policies referenced covered Mr. Helton or Mr. Tyra individually.

18. Side by Side did not produce any job bids, estimates, advertisements or business licenses for Mr. Tyra or Mr. Helton, or documentation regarding work performed for any individuals or entities other than Side by Side.

19. Mr. Helton and Mr. Tyra provided most of their own tools and equipment used in siding installation but various times used a brake, snips and ladder provided by Side by Side.

20. Mr. Perigo visited each job site to, in Mr. Perrigo's words, "outline what work has to be done," remained in communication with Mr. Helton and Mr. Tyra by cell phone as work progressed, sometimes assisted in the work by cutting and bending siding, and discouraged Mr. Tyra and Mr. Helton from engaging other people to assist them in performing work.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, Side by Side, bears the burden of proof 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:

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. . . .

(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. Tenn. Code Ann. § 50-6-113 provides in pertinent part as follows:

- (a) A principal or 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, intermediate contractor, or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

* * * *

- (f)(1) [A]ny person engaged in the construction industry, including principal contractors, intermediate contractors, or subcontractors, shall be required to carry workers' compensation insurance. This requirement shall apply whether or not the person employs fewer than five (5) employees. Sole proprietors and partners shall not be required to carry workers' compensation insurance on themselves. In addition, the provisions of this subsection (f) shall not apply to any person building a dwelling or other structure, or performing maintenance, repairs, or making additions to structures, on the person's own property for the person's own use and for which the person receives no compensation.

4. Side by Side has failed to show by a preponderance of the evidence that Mr. Helton and Mr. Tyra were not its employees or "statutory employees" during the Policy Period. Although Mr. Helton and Mr. Tyra entered into subcontractor agreements with Mr. Perigo, the Tennessee Supreme Court has held that a contract purporting to establish the plaintiff as an "independent contractor" is insufficient when the facts surrounding the arrangement indicate that the plaintiff is an employee. See Boruff v. CAN Ins. Co., 795 S.W.2d 125, 126 (Tenn. 1990).

5. Applying the factors specified in Tenn. Code Ann. § 50-6-102(10)(D), the record shows that Mr. Perigo visited each job site where work was performed, provided some degree of supervision of, and assistance to, Mr. Helton and Mr. Tyra during the course of each siding installation job. The Tennessee Supreme Court has recognized that, while no single factor is "entirely indicative," the primary factor in determining whether a person is an independent contractor is the right to control the conduct of the work. See Masiers v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982). Mr. Helton and Mr. Tyra

worked almost exclusively for Side by Side during the Policy Period, typically worked together at the same job sites, and were paid by square foot rather than by the project. Although Mr. Helton and Mr. Tyra provided most of their own tools, they also used some tools provided by Side by Side, including a brake, snips and ladder. Side by Side did not produce any job bids, estimates, advertisements or business licenses for Mr. Tyra or Mr. Helton, or documentation regarding work they performed for customers other than Side by Side.

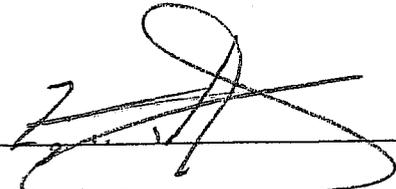
6. Pursuant to Tenn. Code Ann. 50-6-113(a)(2005), a principal contractor is liable for uninsured work-related injuries sustained by its subcontractor's employees. Side by Side would be unable to satisfy the burden recognized in CNA v. King, 2006 WL 2792159 (Tenn. Ct. App. Sept. 28, 2006) to demonstrate that that Mr. Helton and Mr. Tyra were independent contractors and would, therefore, have had to answer any claim or suit brought against it for workers' compensation benefits as their employer or statutory employer.

7. 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:

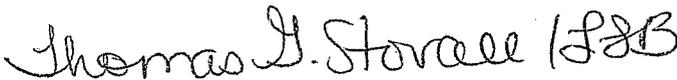
1. Mr. Helton and Mr. Tyra should be considered employees of Side by Side;
2. The audit premium billing adjustment issued by Hartford on September 13, 2007 in the amount of \$16,069.00 is correct and payable.
3. Costs of this proceeding are taxed against the Petitioner, Richard Perigo d/b/a Side by Side Vinyl Siding.

This Final Order is entered and effective this the 1 day of October,
2010.



Larry C. Knight, Jr.
Assistant Commissioner of Insurance

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 1st,
day of October, 2010.


Thomas G. Stovall, Director
Administrative Procedures Division

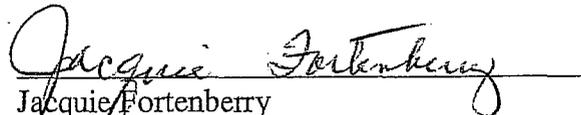
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the within and foregoing document has been sent by U.S. Mail, postage prepaid, to the following on this 4th day of October, 2010:

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