



STATE OF CONNECTICUT

INSURANCE DEPARTMENT

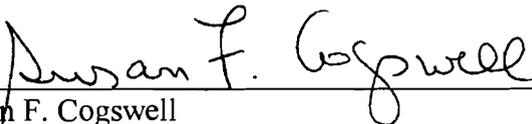
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 In the Matter of:) Docket No. PC 06-74
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 Appeal by St. Paul Travelers concerning the)
 workers' compensation insurance policy issued to)
 The Fence Company LLC)
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ORDER

I, Susan F. Cogswell, Insurance Commissioner of the State of Connecticut, having read the record, do hereby adopt the recommendations of Michael S. Malesta, Hearing Officer, and issue the following orders:

1. The appeal by St. Paul Travelers ("Travelers" or "Appellant" herein), of the decision of the NCCI Connecticut Ratings and Appeals Board is hereby denied.
2. The Fence Installers (as defined in the attached Decision) used by The Fence Company, appellee, are independent contractors for workers' compensation insurance purposes.
3. The claim by Travelers that it is entitled to additional workers' compensation premium as a result of the inclusion of the compensation for the Fence Installers used by The Fence Company during the policy period August 15, 2003 through August 15, 2004 is hereby denied.

Dated this 2nd day of January, 2007.



 Susan F. Cogswell
 Insurance Commissioner



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MEMORANDUM OF DECISION

Introduction

This hearing considers an appeal taken under Connecticut General Statutes Section 38a-329 and Section 38a-8-67 of the Regulations of Connecticut State Agencies by St. Paul Travelers (referred to as "Travelers" or "Appellant" herein) from the January 17, 2006 decision of the NCCI Connecticut Ratings and Appeals Board (the "Board") ruling that certain workers are not to be considered employees of The Fence Company LLC (referred to as "TFC" or "Appellee" herein) for workers' compensation premium calculation purposes. This matter arises as a result of a workers' compensation audit (the "Audit") made by Travelers with respect to workers' compensation and employer's liability policy #IOUB8649A20803 (the "Policy"), effective August 15, 2003 through August 15, 2004. Pursuant to the Audit, Travelers sought to include the payroll of six (6) workers (hereinafter referred to as "Fence Installers") amounting to \$361,059 of additional payroll resulting in approximately \$78,000 of additional premium.

The hearing was held on October 18, 2006 at the Insurance Department in which the undersigned was designated Hearing Officer by the Insurance Commissioner. The issue to be decided on appeal is whether the Fence Installers should be considered employees or independent contractors for purposes of determining the premium due, if any, under the Policy.

Factual Findings

Each party to the proceeding was given an opportunity to present and cross-examine witnesses at the Hearing in an effort to ensure that all relevant information was included on the record. Travelers was represented by Robert W. Cassot, Esq. of Morrison Mahoney LLP and offered one (1) witness, Arleen Desmond, Director in Travelers residual markets division (Tr. at 113). TFC appeared *pro se* with Ben Lawrence, Vice President arguing on behalf of TFC. Witnesses for TFC were: Elizabeth Vernon, owner of TFC (Tr. at 46, 47); Jeffrey Vernon, currently President of TFC (Tr. at 143); Ben Lawrence, Vice President of TFC (Tr. at 6) and Richard Oulundsen, President of Jones, Raphael & Oulundsen, Inc., the insurance agency that secured the workers' compensation insurance at issue for TFC (Tr. at 157). The Hearing Officer hereby makes the following findings of fact:

1. Travelers insured TFC under a policy of workers' compensation and employers liability insurance for the period August 15, 2003 through August 15, 2004.
2. The parties agree that the central issue in this case is the employee or non-employee/independent contractor status of six (6) Fence Installers (Tr. at 12, 25).
3. TFC's business model consists of methodologies developed by Home Depot and Lowe's (Tr. at 102). The methodology consists of a three-tiered structure. The first part of this structure consists of salespeople for nationally recognized retailers (e.g. Home Depot and Lowe's (hereinafter referred to as "National Retailers")) who secure customers for fence installations and employ project managers. (Tr. at 26, 84). The National Retailers market the program and contract directly with the customer for the type of fencing and installation services (Tr. at 26). The second tier of the structure consists of the National Retailer contracting with TFC to administer fence installation work orders for the National Retailers' customers (Tr. at 26). TFC handles administrative processing for National Retailers including processing sales contracts for fence installations; permitting requirements; scheduling of installations; and invoice processing to secure payments for Fence Installers (Tr. at 26, 27, 56, 59).
4. TFC employs a project manager who recruits Fence Installers to perform fence installations for the National Retailers' customers (Tr. 28, 54, 90).

5. Pursuant to their agreements with customers, the National Retailers use teams of project managers. National Retailer project managers have the sole right to inspect the installation and review customer complaints (Tr. at 34, 91). National Retailers and/or their project managers are responsible for dealing with complaints from customers with respect to the installation and securing a 'customer sign-off' for successful completion of a fence installation project (Tr. at 30, 58, 66).
6. TFC provides no supervision or inspection through the completion of the installation process (Tr. at 28, 34, 103).
7. Fence Installers can and do reject jobs (Tr. at 85, 89 and 188).
8. Fence Installers have the option to lease equipment from TFC for fence installation projects (Tr. at 32, 70, 71).
9. National Retailers supply the materials used for fence installation projects (Tr. at 37). In the event sufficient material is not supplied, Fence Installers may purchase materials and are reimbursed by TFC; TFC then reviews such purchases with the National Retailers for reimbursement (Tr. at 66, 67).
10. Fence Installers are paid by the linear foot upon customer 'sign-off' that the job has been successfully completed (Tr. at 31, 71).
11. TFC has the right to terminate its agreement with Fence Installers for cause and Fence Installers have the right to terminate their agreement with TFC for cause (Tr. 86, 148).

Procedural Background

This matter was heard by the Department pursuant to the provisions Conn. Gen. Stat. §38a-19 as a result of an appeal by Travelers of the Board's hearing decision of January 17, 2006. The Appeals Board found that the Fence Installers were not employees of TFC and, therefore, payroll for these workers was not to be included in the workers' compensation premium calculation by Travelers for the policy period August 15, 2003 through August 15, 2004. Jurisdiction for this matter is found under Conn. Gen. Stat. §38a-329 and Section 38a-8-67 of the Regulations of Connecticut Agencies. The dispositive issue to be decided in this appeal is whether the six (6) Fence Installers should be considered employees and, as a result, TFC should be liable to Travelers for additional workers' compensation premium applicable to these workers. For the reasons set forth

below, the Hearing Officer recommends that the decision of the Appeals Board be upheld.

Pursuant to the terms of the insurance policy #IOUB8649A20803 issued to TFC, Travelers has the right to audit the insured to determine the final premium due thereunder. Travelers conducted such an audit of TFC and, as a result, issued a "Premium Audit Analyst Notification" dated October 12, 2004 showing additional payroll of \$361,059 to be included in TFC's premium calculation. Subsequent to the audit, TFC met with representatives of Travelers on January 27, 2005 to discuss the findings. By letter dated March 14, 2005 (Plaintiff/Appellant's Exhibit J), Travelers advised TFC that it completed its review of the initial audit and concluded that its auditor "was correct to have included the fence installation laborers in the audit premium basis." This conclusion was based on the information documented by its auditor together with information provided in the January 27 meeting. The March 14th letter states:

We believe these individuals to be employees, and *not* independent contractors, based on the following elements of their relationship with the fence company:

1. The nature of the work performed is essential to our insured's business, and is the same as what would normally be performed by an employee of your type of business.
2. They are paid a rate by the linear foot, and not by the job. This is an arrangement for a labor rate.
3. They are supplied with tools, vehicles, and equipment by The Fence Company. Items provided include, but are not limited to, hand tools, power tools, vehicles, cell phones, fuel cards etc.
4. The fencing laborers do not provide the materials for the job.

In addition, Travelers relies on Connecticut Workers' Compensation law and insurance policy provisions approved by the Insurance Department in support of its position that the Fence Installers should be treated as employees for workers' compensation premium calculation purposes.

Discussion

As a general matter, insurers need to determine the status of workers under the Workers' Compensation Act—either employee or independent contractor—in order to calculate the premium due under a workers' compensation policy. Pursuant to the policy terms, the premium basis includes payroll and other remuneration for officers, employees and all other persons engaged in work that could make the insurer liable under the policy. As a

result, insurers consider the definition of “employee” under Conn. Gen. Stat. §31-275 and related Connecticut case law. The Workers’ Compensation Act further provides under Conn. Gen. Stat. §31-290 that no form of contract or agreement between the employer and its workers can “relieve any employer, in whole or in part, of any obligation” created under the workers’ compensation laws. Accordingly, the form of the transaction in which the employer and workers agree is not determinative of the relationship as “employee” or “independent contractor”.

Under Connecticut law, the determination of the status of workers as independent contractors or employees is a question of fact. As set forth in *Kaliszewski v. Weathermaster AlSCO Corporation*, 148 Conn. 624 (1961) and its progeny, the “right to control” test is used in making this determination. “One is an employee of another when he renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment as well as in the result attained. The controlling consideration in the determination whether the relationship of master and servant exists or that of independent contractor is: Has the employer the general authority to direct what shall be done and when and how it shall be done—the right of general control of work....The test of the relationship is the right to control. It is not the fact of actual interference with control but the right to interfere which makes the difference between an independent contractor and a servant or agent.” *Id.* at 629.

Further, the Connecticut Supreme Court in *Hanson v. Transportation General, Inc.*, 245 Conn. 613 (1998), specifically rejected replacing the “right to control” test enunciated in *Kaliszewski* with the “relative nature of the work” test. “The ‘relative nature of the work’ test determines the relationship between a worker and a putative employer by asking whether the worker’s performance is an integral part of the regular business of the putative employer.” *Id.* at 619, 620. Under the “relative nature of the work” test which appears to be the standard applied by Travelers in its March 14, 2005 letter (Exhibit J), the analysis relates to the character of the work performed and the business relationship of the work to the putative employer’s business rather than the right to control the individual.

During the present hearing, Appellant introduced testimony of its director of the residual markets division as a workers' compensation expert who did not participate in the audit of TFC nor in one or more later meetings between TFC and Travelers but who became involved in the matter at the time TFC filed its appeal with the Board. Traveler's expert based her analysis of whether the workers in question should be considered employees on the audit workpapers prepared by Traveler's auditors. These auditors offered no testimony as they were not present at this hearing. In fact, the basis offered by Traveler's expert that the workers in question were, in fact, employees of TFC during the policy period is her opinion that Travelers would have been liable to pay workers' compensation benefits to the Fence Installers had they been injured on the job. Travelers has not offered support for the proposition that Connecticut courts have viewed this type of subordinate fact as a basis for finding that disputed workers are in fact employees under applicable law.

Further, Appellant's testimony during the hearing centered on unsigned independent contractor agreements (Tr. at 78 *et seq.* and Exhibit G) and Appellee's website information that did not exist during the policy period at issue in this case (Tr. at 55). As stated above, the form of the transaction used by the parties is not determinative of the employee versus independent contractor question. As a result, the Hearing Officer does not place great weight on this evidence since the connection between the information contained in the website and TFC's right to control the Fence Installers appears tenuous at best.

Based on a review of the record, Appellant's testimony does not support the proposition that TFC had the right to control the workers, as required under *Kaliszewski* and *Hanson*, to consider the Fence Installers employees of TFC. The subordinate facts of this case amply support a finding that the Fence Installers should be considered independent contractors. See *Chute v. Mobil Shipping and Transportation Co.*, 32 Conn. App. 16 (1993) requiring a review of subordinate facts. In particular, testimony was offered by TFC that its recruiter, Martin Carrera, is responsible for securing networks of fence installers for various geographic locales. He is responsible for assuring that the fence installers he recruits are able to comply with the installation requirements mandated by the National Retailers but does not supervise Fence Installers on the job. National

Retailer project managers have the sole right to inspect the installation and review customer complaints (Tr. at 34, 91). TFC provides no supervision or inspection through the completion of the installation process (Tr. at 28, 34, 103). As stated in *Kaliszewski*, it is the right to interfere with the worker providing service that makes the difference between an employee and an independent contractor. In the present case, the supervision of the day-to-day installations and the right to control that work rests with the National Retailer's project managers.

Other subordinate facts support the proposition that TFC does not have the right to control the Fence Installers including that Fence Installers "can and do reject jobs" and that Fence installers have the *option* to lease equipment for installations or use their own. While much was made of a consistent business model methodology be implemented as dictated by the National Retailers, this factor alone is not tantamount to a finding that the workers in question be treated as employees for workers' compensation insurance purposes. In summary, substantial testimony was presented in support of the position that TFC did not have the right to control the Fence Installers and, accordingly, should be treated as independent contractors.

Recommendations

Based on the testimony and exhibits presented at the hearing together with the analysis set forth above, the undersigned recommends the following to the Insurance Commissioner:

1. Deny Appellant's appeal from the decision of the Board.
2. Deny Appellant's claim that it is entitled to additional workers' compensation premium by including the compensation for the Fence Installers used by TFC during the policy period.
3. Find that the Fence Installers in question are independent contractors for workers' compensation premium calculation purposes.



Michael S. Malesta, Hearing Officer

Date: *January 2, 2007*



STATE OF CONNECTICUT

INSURANCE DEPARTMENT

CERTIFICATION OF SERVICE

I, Michael S. Malesta, hereby certify that a copy of the foregoing Order and Memorandum of Decision was sent by email and by First Class Mail, postage prepaid, to all parties of record as follows:

Attorney Robert W. Cassot
Morrison Mahoney LLP
One Constitution Plaza, 10th Floor
Hartford, CT 06103-1810

and

Ben Lawrence, Vice President
The Fence Company
1 Waterside Lane
Essex, CT 06426

A handwritten signature in cursive script that reads "Michael S. Malesta".

Michael S. Malesta
Hearing Officer
Connecticut Insurance Department

Dated at Hartford, Connecticut, this 2nd day of January, 2007