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

2012 MAR 27 PM 3:02 AM 10:31
SECRETARY OF STATE
2012 MAR 28 AM 10:31

IN THE MATTER OF:	)	
THE LAMPO GROUP, INC.	)	
and	)	**Docket No. 12.28-113202A**
NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.	)	**WC Appeal - Insurance**
and	)	
HARTFORD INSURANCE COMPANY OF THE MIDWEST	)	

FINAL ORDER

This matter was heard on October 18, 2011, before the Honorable Lynn England, Administrative Judge, assigned by the Secretary of State, with Marie Murphy, Assistant Commissioner for Policy of the Tennessee Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. Chlora Lindley-Myers was subsequently appointed the Commissioner's Designee and, as the Commissioner's Designee, Ms. Lindley-Myers makes the final determination as to the Findings of Fact and Conclusions of Law in this matter. The Lampo Group, Inc. ("Lampo") was represented at the hearing by Attorney W. Judd Peak of Waller Lansden Dortch and Davis, LLP. The National Council for Compensation Insurance, Inc. (NCCI) was represented by Attorney W. Davidson Broemel of Burr & Foreman LLP. Hartford Insurance Company of the Midwest ("Hartford") did not participate in the appeal and was not represented at the hearing.

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 whether NCCI correctly determined that Code 7610 (Radio or Television Broadcasting—All Employees & Clerical, Drivers) should be assigned to all Lampo employees, including those which are not involved in production of the Dave Ramsey Show (the "Show"), thereby eliminating a dual classification by which Code 8810 (Clerical Office Employees—NOC) was assigned to employees performing clerical office functions and Code 7610 was assigned to and employees involved in production of the *Show*.

After consideration of all testimony, exhibits and the entire record in this matter, it is concluded that, although NCCI correctly determined that the dual classification of Lampo employees under both Code 7610 and Code 8810 was improper, Code 7610 is not the correct governing classification applicable to the business of Lampo. The basic classification which best describes the business of Lampo is Code 8810.

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

FINDINGS OF FACT

1. The Lampo Group, Inc. ("Lampo") is a for-profit corporation engaged in personal financial counseling, educational programs and publications with its principal office located in Brentwood, Tennessee. Lampo conducts various personal financial planning and

courses through its Financial Peace University and produces the radio *Dave Ramsey Show* (the "*Show*").

2. The National Council on Compensation Insurance, Inc. ("NCCI") is the designated rate service organization for the State of Tennessee pursuant to Tenn. Code Ann. § 56-5-320 responsible for collecting and compiling workers' compensation insurance data and providing various reports.

3. Hartford Insurance Company of the Midwest ("Hartford") is an insurance company that holds a certificate of authority issued by the Commissioner to sell workers' compensation insurance in Tennessee.

4. Hartford provided workers' compensation and employer liability insurance coverage at all times relevant for Lampo employees.

5. Workers' compensation classification codes are determined in accordance with the *Basic Manual for Workers' Compensation Liability Insurance* ("*Basic Manual*") and *Scopes of Manual Classifications* ("*Scopes Manual*") published by NCCI. The *Scopes Manual* describes and explains the classifications contained in the *Basic Manual.*

6. Since, 1994, Code 7610 and Code 8810 have been assigned to Lampo employees, with Code 8810 assigned to the majority of employees, and Code 7610 assigned to about eight employees involved in production of the *Show*.

7. The Chief Operating Officer of Lampo, Matt Woodburn, testified that the dual classification of Lampo employees had existed for a number of years. In the first years of the company's existence, Lampo was engaged in only personal financial counseling and had a small number of employees who were classified as office and clerical. Mr. Woodburn stated that the *Show* was started in about 1994, at which time Dave Ramsey and a number of Lampo employees would travel to the facilities of a Nashville radio station, WWTN, for live

broadcasts of the *Show*. Since the Lampo employees performed their work at a radio station, it was deemed fair and reasonable to assign Code 7610 to such employees. Since 1994, production of the *Show* has not required Lampo employees to travel to a radio station; however, the dual classification of employees using Code 7610 and Code 8810 has continued.

8. Mr. Woodburn testified that he was aware that NCCI had suggested that Lampo could create a separate legal entity to include only the employees involved in production of the *Show*, that such *change* would have permitted their separate classification consistent with Rule 1-D-1 of the *Basic Manual*, and that a separate legal entity was not created because it was believed that it was not a dual classification was nevertheless possible.

9. Lampo has no radio tower, outside radio engineers, remote mobile broadcasting unit, transmitters, FCC license, radio station call letters or assigned frequency. Rather, Lampo records the *Show* using phone lines to take calls from listeners and sends it to American Broadcasting Company Distribution ("ABC") by an integrated services digital network (ISDN) phone line which in turn sends it to a satellite for broadcast by radio stations. There is no interaction between Lampo and the radio stations that broadcast the *Show*.

10. Lampo's insurance agent, Jeff Zander, testified that Lampo has had "exceptional" claims experience in comparison to radio and television broadcasting industry and has, for example, reporting only two (2) claims in the last two years, totaling about $2,000.00 on about $120,000.00 of premium paid.

11. On December 9, 2010, an audit and physical inspection of Lampo offices in Brentwood was performed by Mr. Grabinski, a NCCI Quality Assurance Specialist. Mr. Grabinski met with the Human Resources Director of Lampo, Rick Perry and observed Dave Ramsey in a recording booth with a microphone, apparently taking and responding to calls from listeners, but did not inspect all the four floors in the Lampo office building.

12. Mr. Grabinski prepared an Inspection and Classification Report dated January 18, 2011 (the "Inspection Report") which determined that the assignment of Code 7610 to Lampo employees was the correct Basic classification for Lampo and that, as such classification includes clerical office employees, a separate classification of clerical office employees using Code 8810 was improper. The Inspection Report identified seven (7) departments within the Lampo organization of 279 employees. One of the departments, with eight employees, was directly involved in production of the *Show*.

13. On January 19, 2011, the Chief Financial Officer of Lampo, Mark Floyd, sent an e-mail message to NCCI contesting the findings of the Inspection Report, contending that it contained a number of inaccuracies regarding the functions of the various departments of Lampo. Mr. Floyd stated in his message that, although Lampo broadcasts the *Show* three (3) hours per day from its offices in Brentwood, the *Show* is one distribution method among many of the teaching of Dave Ramsey's personal financial principles and not the core business. Mr. Floyd further stated that Lampo is "by no means a radio station" and attached a spreadsheet detailing 2010 revenues and payroll for each Lampo department indicating that the *Show* represents less than ten percent (10%) of Lampo revenues, and that only eight of Lampo's 279 employees are involved in the production of the radio show. He also noted that the phraseology of Code 7610 lists outside engineers, field transmitters, tower climbing, mobile news units, etc., which are common activities of a radio station but which are not applicable to Lampo. Mr. Floyd concluded his message with a request for an exception that would allow assignment of Code 8810 for the Lampo payroll that "fits that scope" and Code 7610 for the employees "directly involved with the radio show."

14. On January 21, 2011, the Regulatory Services Manager for NCCI, Maureen Longanacre, sent an e-mail message to Mr. Floyd which cited Rule 1-D-1 which states:

"Classification rules apply separately to each legal entity operating in a state even if multiple entities are insured under a single policy." Ms. Longanacre stated that the Tennessee Internal Review Panel established by NCCI is not authorized to grant exceptions to the approved rules and that the phraseology of Code 7610 includes clerical employees, meaning that such employees cannot be separately assigned to Code 8810.

15. Mr. Floyd sent an additional e-mail message to Ms. Longanacre on January 26, 2011 to which he attached a copy of the Inspection Report that included comments regarding those sections which Lampo argued were inaccurate or misleading.

16. On May 3, 2011, NCCI sent a Dispute Resolution Meeting Agenda to Lampo and other parties scheduling a Internal Review Panel teleconference for May 10, 2011 which included a Summary of Policyholder's Position as follows: "We are asking for an exception that would allow us to use Classification Code 8810 for the payroll that fits that scope, and Classification Code 7610 for the employees directly involved with the radio show."

17. On May 16, 2011, NCCI's Tennessee Internal Review Panel issued a Case Summary Notice of Decision of NCCI's stating that the correct classification for Lampo is Code 7610, noting:

> The Panel understands that many of [Lampo] employees may perform clerical duties, but the production of the radio show includes at least three (3) hours each day to just record it. The Panel believes that another two (2) hours each day involve preparation for the show and then preparing the content for "transmission." The Panel referred to Basic Manual Rule 1-A, which states that it is the business of the employer within a state that is classified, not separate employments, occupations or operations within the business.

18. NCCI's Rules and Classification Manager, Ron Darna, testified that, based on his review of the Inspection Report and knowledge of NCCI rules, he agreed with Mr.

Grabinski's finding that Code 7610 should be assigned to all Lampo employees, and that Code 8810 should be deleted.

19. Lampo timely filed an appeal with the Department of Commerce and Insurance on June 6, 2011.

20. Hartford Insurance Company of the Midwest declined to participate in the appeal.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, Lampo Group, Inc., 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. § 56-5-320 requires each insured to be a member of the designated rate service organization and to adhere to a uniform classification system filed by the rate service organization and approved by the Commissioner.

3. The National Council on Compensation Insurance ("NCCI") is the designated rate service organization for the State of Tennessee pursuant to Tenn. Code Ann. § 56-5-320.

4. Workers' compensation classification codes are determined in accordance with the *Basic Manual for Workers' Compensation Liability Insurance, 2001 Edition* ("*Basic Manual*") and *Scopes® of Manual Classifications* ("*Scopes Manual*") published by NCCI. The *Basic Manual*, which has been filed and approved by the Commissioner, describes the workers' compensation classifications and the rules used to apply those classifications to employers. The *Scopes Manual*, which has not been filed with or approved by the Commissioner, describes and explains the classifications contained in the *Basic Manual*.

5. Rule 1-A of the *Basic Manual* provides as follows:

1. The purpose of the classification system is to group employers with similar operations into classifications so that:

   - The assigned classification reflects the exposures common to those employers
   - The rate charged reflects the exposure to loss common to those employers

2. Subject to certain exceptions, it is the business of the employer within a state that is classified, not separate employments, occupations or operations within the business.

6. Rule 1-D of the *Basic Manual* provides in pertinent part:

The purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer within a state. Subject to certain exceptions described in this rule, each classification includes all the various types of labor found in a business.

It is the business that is classified, not the individual employments, occupations or operations within the business.

Certain exceptions apply and are noted below.

* * * *

1. Separate Legal Entities

   Classification rules apply separately to each legal entity operating in a state even if multiple entities are insured under a single policy.

2. Businesses Not Described by a Classification

   If no basic classification clearly describes the business, the classification that most closely describes the business must be assigned. For a business not described by any classification, show the wording that describes the business in Item 4 of the Information Page of the policy. With this wording, show the code number of the classification that most closely describes the business. All the rules pertaining to the assigned basic classification apply to the operation.

* * * *

4. Standard Exceptions

   Standard Exceptions must be separately classified unless specifically included in a classification assigned to the business.

   Classifications for Standard Exceptions apply even if the basic classification includes phrases such as "all employees" or "all operations."

5. Businesses Described by a Standard Exception Classification

If the principal business is described by a Standard Exception Classification, the operations of all employees not included in the definition of Standard Exception classification must be assigned to the separate basic classification that most closely describes their operation. Classification rules apply separately to each legal entity operating in a state even if multiple entities are insured under a single policy.

7. Rule 1-C-2-D of the *Basic Manual* provides in pertinent part:

If the classification wording uses the terms "includes" or "&," the operation or employees cited after those terms must not be assigned to a separate classification. This applies even though the operation or employees may be described by another classification or are at a separate location.

8. Class Code 8810 is defined in the *Scopes Manual* as follows:

Code 8810- Clerical Office Employees-NOC

Subject to the Standard Exception Classification rule

SCOPE: Code 8810 is applied to clerical office employees provided they are not otherwise classified in this guide. Code 8810 employees are common to so many businesses that they are considered to be Standard Exceptions unless they are specifically included within the phraseology of a Basic Classification. The duties of a clerical office employee include creation or maintenance of financial or other employer records, handling correspondence, computer composition, technical drafting, and telephone duties, including sales by phone. The clerical office classification continues to apply to a qualified clerical office employee who performs a duty outside of a qualified clerical office area when that duty does not involve direct supervision or physical labor and is directly related to that employee's duties in the office. These duties do not exclude depositing funds at the bank, purchasing office supplies and pickup or delivery of mail, provided they are incidental and directly related to that employee's duties in the office. However, for purposes of this rule, the definition of clerical duties excludes outside sales or outside representatives; any work exposed to the operative hazards of the business; and any work, such as a stock or tally clerk, which is necessary, incidental or related to any operations of the business other than a clerical office. A clerical office is a work area separated and distinguishable from all other work areas and hazards of the employer by floors, walls, partitions, counters or other physical barriers. A clerical office excludes work or service areas and areas where inventory is located, products are displayed for sale, or to which the purchaser customarily brings the product from another area for

payment. In instances where clerical or drafting employees engage in any other duties, the total payroll of such employees would be assigned to the highest rated classification representing any part of their work.

9. NCCI correctly determined that Code 8810, which is a "not otherwise classified (NOC)"-type classification and subject to the Standard Exception rule, cannot be used with a basic classification, such as Code 7610, which includes clerical office employees in its classification or phraseology. Industry classifications which specifically include "clerical office employees" in their description or phraseology do so at least in part due to the difficulty in distinguishing between clerical and non-clerical activities for these classifications. An NOC-type classification code cannot be used if the employer meets any other existing classification. Code 8810 must, therefore, be deleted if Code 7610 is the appropriate classification of Lampo employees involved in the *Show*. The Inspection Report contained a number of factual errors as to the number and scope of employees involved in the production and promotion of the *Show* and, perhaps, the nature of Lampo's business; however, NCCI did not have authority to approve a continuation of the dual classification requested by Lampo and was consistent with NCCI rules if Code 7610 were otherwise appropriate.

10. Class Code 7610 is defined by the *Scopes Manual* as follows:

> 7610 – Radio or Television Broadcasting Station-All Employees & Clerical, Drivers
>
> Includes players, entertainers or musicians.
>
> SCOPE: Code 7610 is applied to all employees of radio or television broadcasting stations. The classification includes both inside and field employees as well as clerical office workers and drivers. Control and lighting operators, cameras and boom microphone personnel, engineers, technicians, scriptwriters, announcers, players, entertainers and musicians whether working solely within the radio or television studio or at locations away from the studio also are contemplated within the scope of this classification. Outside engineers visually inspect field transmitters and make connections for "pick-up" at golf courses, ballparks, auditoriums, etc. These engineers may at times service existing towers involving tower

> climbing, although telephone company employees are generally responsible for the facilities up to the area to be served so that the radio or television station employees need only place their equipment. The work performed by control or monitoring crews during performances in auditoriums or elsewhere outside of the studio involves variable exposure depending upon the location of the "special feature" which is to be picked up, and their work is practically the same as performed by studio control or monitoring crews.
>
> * * * *

11. Lampo's request for an exception permitting continuation of a dual classification of its employees using both Code 7610 and Code 8810 was properly denied; however, Lampo has shown by a preponderance of the evidence that Code 7610 is **not** the appropriate classification as to its employees involved in the production of the *Show*. The difficulty in determining whether Code 7610 is the appropriate classification arises in part to a number of factors, including the "Listen Live" banner and link to live broadcasts on the Lampo website and fact that a number of Lampo employees routinely refer to "broadcast" of the *Show*. Also, the phraseology of Code 7610 does not differentiate between creation of content for broadcast and actual broadcast; it appears to assume that the business does both. However, for purpose of the governing classification and associated risk, it is determined that Code 7610 contemplates that the business has a transmitter and/or other equipment required to distribute a television or radio signal to a dispersed audience and can, therefore, be distinguished from a business which only creates visual or audio content for broadcast. Lampo records the *Show* using phone lines to take calls from listeners, and is connected to a third-party distributor (ABC) by an ISDN phone line. Lampo has no radio tower, outside radio engineers, remote mobile broadcasting unit, transmitters, FCC license, radio station call letters or assigned frequency. Lampo does not pay any royalties to ASCAP or BMI.

12. There is no dispute that Classification 8810 is the appropriate classification for the majority of Lampo employees that are not involved in the production of the *Show*, and that

the *Scopes Manual* does not contain a Classification Code applicable to financial counseling or personal financial education content providers. Code 8810 is subject to the Standard Exception rule and can be assigned only when certain conditions have been met. Employees must, for example, be engaged in clerical activities with no additional duties and work in a physically separated workspace. Based on the Inspection Report, however, it appears that these conditions have been met. It is, therefore, determined that Code 8810 is the most appropriate classification for Lampo employees involved in production of the *Show* as well as those Lampo employees who are not.

13. 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."

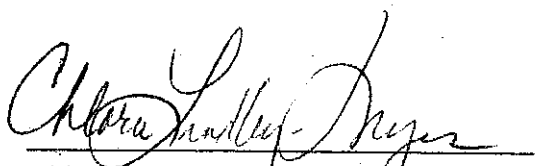
NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows:

1. The dual classification of Lampo employees using both Code 7610 and Code 8810 conflicts with Rule 1-C-2-d of the *Basic Manual* and is improper;

2. The Inspection Report should be amended to provide that the appropriate classification for Lampo employees is Code 8810 effective as of the date of the Inspection Report; and

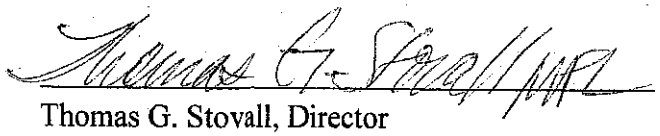
3. Costs of this matter shall be borne equally by the parties.

This Final Order is entered and effective this the 27th day of March, 2012.



Chlora Lindley-Myers
Assistant Commissioner for Policy

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 27th, day of March, 2012.



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)(l)(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.

*****

(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,

W. Davidson Broemel, Esq.
Burr & Forman LLP
700 Two American Center
3102 West End Avenue
Nashville, TN 37201

W. Judd Peak, Esq.
Waller Landsden Dortch & Davis LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219

Richard D. Keough
Hartford Accident and Indemnity Company
1 Hartford Plaza
Harford, CT 06155

Michael R. Shinnick
Workers' Compensation Manager
Tennessee Department of Commerce and Insurance
500 James Robertson Parkway, Fourth Floor
Nashville, TN 37243

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

This the 28th day of March, 2012.

Jacquie Fortenberry

Jacquie Fortenberry