

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

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SECRETARY OF STATE

IN THE MATTER OF:)
)
SATELLITE SOLUTIONS)
)
and)
)
COMPANION PROPERTY & CASUALTY)
GROUP)

Docket No. 12.28-115748A
WC Appeal - Insurance

FINAL ORDER

This matter was heard on August 20, 2012, before the Honorable Kim Summers, Administrative Law Judge, appointed by the Secretary of State, with Chlora Lindley-Myers, Assistant Commissioner for Policy, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner Designee, Ms. Lindley-Myers makes the final determination as to the findings of fact and conclusions of law in this matter. The Petitioner, Daniel Frank Russell, doing business as Satellite Solutions ("Satellite Solutions"), was represented by Attorney Robert M. Stivers, Jr. Companion Property & Casualty Group ("Companion") was represented by Attorneys Richard Clark and J. Allen Callison.

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: (1) whether 103 installation/service technicians (the "Technicians") engaged by Satellite Solutions should be considered "employees" within the meaning of Tenn. Code Ann § 50-6-102(10)(D) or independent contractors and, based on such determination; (2) whether Satellite owes additional premium based in the amount of seventy two thousand four hundred seventeen dollars (\$72,417) based on the remuneration paid to the Technicians during the July 17, 2010-July 17, 2011 period in which the workers' compensation insurance policy issued by Companion was in effect.

Upon consideration of the record, it is determined that: (1) the Technicians should be considered employees rather than independent contractors; and (2) Satellite Solutions owes additional premium to Companion in the amount of seventy two thousand four hundred seventeen dollars (\$72,417).

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

FINDINGS OF FACT

1. Satellite Solutions was at all times relevant a proprietorship owned by Daniel Russell ("Mr. Russell") in the business of installing and servicing digital satellite TV systems and equipment, primarily for Up Communications, LLC ("Up Dish"), a regional satellite television installation company for Dish Network Corporation ("Dish[®] Network") in the Knoxville, Tennessee area.
2. Satellite Solutions engaged 103 installer/ technicians ("Technicians") to perform satellite TV installation, service and repair services on a 1099 basis.

3. Satellite Solutions did not require a written application, contract or proof of workers' compensation coverage.

4. Satellite Solutions did not restrict Technicians from performing work on their own or for other companies, and could immediately terminate its relationship with Technicians at any time with or without reason or advance notice.

5. Companion Property and Casualty Group ("Companion") is an insurance company which holds a certificate of authority issued by the Commissioner to sell workers' compensation insurance in Tennessee.

6. Companion issued Workers' Compensation and Employers Liability Policy Number WTN1203222 01 41 (the "Policy") to Daniel Russell for the period July 17, 2010-July 17, 2011 (the "Policy Period").

7. The Policy contains the following pertinent provisions:

Classifications

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

Remuneration

Premium for 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.

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

Audit

You will let us examine and audit all 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 Information developed by audit will be used to determine final premium.

8. On September 12, 2011, Jeffrey Goodman ("Mr. Goodman") conducted a physical audit of Satellite Solutions on behalf of Charter Premium Audits, LLC.
9. The audit report prepared by Mr. Goodman based on the September 12, 2011 audit ("Audit Report") indicated that the Operations Manager for Satellite Solutions, Dot Patton ("Ms. Patton"), advised that Satellite Solutions paid one million six hundred twelve thousand two hundred sixty-eight dollars (\$1,612,268) to the 103 Technicians during the Policy Period, that such amounts were reported to Internal Revenue Service on a 1099 basis rather than W-2, but that the third payroll service company with which Satellite Solutions contracts, Payroll Source, erroneously labeled the payment information as an "Employee Pay History Report," failed to report deductions and, rather than reporting the gross payments, had reported the net payments.
10. The Audit Report stated that the Technicians should be considered "1099 employees" rather than independent contractors based on the information provided by Ms. Patton that the 103 Technicians were paid by Satellite Solutions on a weekly basis by direct deposit, with deductions for uniforms, and were eligible for weekly bonuses according to the quality of their work.
11. Mr. Russell doing business as Satellite Solutions entered an Independent Contractor Agreement effective July 16, 2010 under which Satellite Solutions agreed to

provide digital by satellite installations and services on behalf of Up Dish on an as-needed basis.

12. Paragraph 2 of the Independent Contractor Agreement provides in pertinent part as follows:

Performance of Services.

- (a) The Contractor shall provide the Services in accordance with the Dish Network Services ("Dish®") Quality Assurance Guidelines (the "Dish Guidelines") in effect from time to time, and in accordance with all other guidelines of the Company provided to the Contractor by the Company from time to time.
- (b) Except as otherwise provided in this Section, the Contractor shall have sole control of the manner and means of his performance of the Contractor's obligations under this Agreement, and the Contractor shall perform such obligations according to his own means and methods of work.

13. Paragraph 15 of the Independent Contractor Agreement requires Satellite Solutions to maintain at least one million dollars (\$1,000,000) comprehensive general liability insurance, automobile insurance, and workers' compensation insurance coverage or an "exemption certificate with proof of filing with the applicable state office."

14. The Independent Contractor Agreement further provides that Satellite Solutions is responsible for all taxes and tax reporting, vehicles, tools, equipment and materials required to perform services, drug testing of Technicians and ensuring that Technicians acquire and maintain Level 1 Satellite Broadcasting and Communications Association certification and meet Dish® Network Quality Assurance Guidelines.

15. Payment rates for particular types of work which were agreed upon by Up Dish and Satellite Solutions were specified on a "Vendor Rate Card."

16. Mr. Russell testified that difference in the amount he is paid by Up Dish and the amount paid to the Technicians for the work performed varies between 10 to 42 percent, that

Technicians were not paid for vacation or sick days and were not paid a signing bonus during the Policy Period.

17. Mr. Russell further testified that Satellite Solutions distributed computer tablets to Technicians supplied by Up Dish in order to receive and complete work assignments, but that Satellite Solutions was not otherwise involved in assigning work or making changes in work assignments.

18. Dean Sherwood ("Mr. Sherwood"), Vice President of Operations for Up Dish, testified via affidavit that Satellite Solutions provides Dish® Network equipment through Up Dish, that Satellite Solutions and its Technicians must account for inventory used, and that additional materials required to install equipment can be purchased by Technicians either from Up Dish or through any electronic supply company. Equipment or clothing may be purchased by Technicians from Up Dish, the cost of which is then charged to Satellite Solutions.

19. Mr. Sherwood testified that Technicians could use any computer or tablet device to select jobs which have been assigned to Satellite Solutions, start and stop points, and to record completion of their work.

20. Mr. Sherwood testified that Up Dish provides specific guidelines for the installation of Dish® Network equipment and conducts quality review of work performed by the Technicians. Satellite Solutions is charged for work which is not completed properly or fails quality review if Up Dish finds it necessary to correct work using one of its employees or someone other than the Technician which performed the original work.

21. Mr. Sherwood testified that Technicians are generally required to have an identification badge, marking on their vehicles, and shirts, caps or other items indicating Dish® Network.

22. Satellite Solutions paid Technicians via direct deposit on a weekly basis based on the number and types of work assignments completed, such amounts being 10-42% less than the amount received by Satellite Solutions from Up Dish for the work performed.

23. Mr. Russell confirmed that Satellite Solutions paid one million six hundred twelve thousand two hundred sixty-eight dollars (\$1,612,268) to the 103 Technicians during the Policy Period, but was unable to testify as to his revenue during such Period.

24. Mr. Goodman testified that some documents he requested from Satellite Solutions, such as invoices, business cards and tax returns were not provided; however, it appeared from the payment information he reviewed that the amount of compensation paid to Technicians was based in part on quality control incentives, and that there were deductions from the pay factor components based on call back service charges.

25. Mandy Shubert, the Account Manager for Payroll Source, testified by affidavit that the term "employee" was used by default in the document prepared for Satellite Solutions captioned "Employee Pay-Out History" which specified gross payments to Technicians and deductions.

26. Mr. Russell testified that he was aware of only one incident during the Policy Period in which a Technician sustained any injury for which medical expenses were incurred, that he called Companion to verify coverage and, after responding to a series of questions, was advised by an unnamed Companion representative that the Technician was an independent contractor and would "not be covered."

27. Suzanne Rich, the Premium Audit Coordinator for Companion, testified by affidavit that she reviewed the supporting documentation of the Audit Report and agreed the 103 Technicians should be classified as employees of Satellite Solutions, and that an additional premium of seventy two thousand four hundred seventeen dollars (\$72,417) was due for coverage during the Policy Period.

28. Mr. Russell sent an email to Companion on October 12, 2011 in which he contested the findings in the Audit Report, arguing that the Technicians: (a) control the "means, details and methods" of the work; (b) are paid by the job; (c) have the option of whether to be paid by direct deposit, cash, check; (d) can select and hire helpers; (e) furnish their own tools and equipment; (f) set their own work days and hours; and (g) are free to work for others besides Satellite Solutions.

29. On December 6, 2011, Mr. Russell filed an appeal with the Plan Administrator of the Tennessee Workers' Compensation Insurance Plan, Aon Risk Services Central, Inc. ("Aon"), citing the seven factors set forth in Tenn. Code Ann. § 50-6-102(11).

30. In a letter dated December 21, 2011, Vice President for Aon, Kim Zersen, advised Satellite Solutions that there was insufficient information to reconsider the classification of the Technicians as employees and instructed Satellite Solutions to file an appeal with the Tennessee Department of Commerce and Insurance (the "Department").

31. Satellite Solutions timely filed an appeal with the Department on January 23, 2012.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. & Regs. 1360-4-1-.02(7), the Petitioner, Satellite Solutions, 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. § 50-6-102 provides in pertinent part as follows:

50-6-102. Chapter definitions. -- 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. Any reference in this chapter to an employee who has been injured shall, where the employee is dead, also include the employees legal representatives, dependents and other persons to whom compensation may be payable under this chapter;

* * * *

(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. Satellite Solutions has failed to show by a preponderance of the evidence that the 103 Technicians working for it should be considered independent contractors rather than employees. Of the factors set forth in Tenn. Code Ann. § 50-6-102(10)(D) which must be considered in determining whether an individual is an employee or independent contractor, no single factor is determinative; however, Tennessee courts have repeatedly emphasized the importance of the right to control work rather than whether such control is actually exercised. *Galloway v. Memphis Drum Service*, 822 S.W.2d 584 (Tenn. 1991). Although the testimony

indicates that the Technicians in most cases accepted, scheduled and completed work assignments during the Policy Period without direct control, supervision or oversight by Satellite Solutions, there is no evidence that Satellite Solutions did not have such right. In the absence of a written agreement between Satellite Solutions and the Technicians which delineates the responsibilities of the Technicians as to the work or as to other matters, such as workers' compensation insurance coverage, the terms of the Independent Contractor Agreement between Satellite Solutions and Up Dish, which defines the scope of the work performed by the Technicians, is particularly significant. Such Agreement provides that Satellite Solutions is responsible for ensuring that all work is performed properly, that it has assumed "sole control of the manner and means" of the work in accordance with Dish® Network Services Quality Assurance Guidelines, that it must maintain general liability and workers' compensation insurance, and that it must ensure drug testing of Technicians. The testimony indicating that Satellite Solutions actually exercised, little, if any direct control with regard to the conduct of work performed, and relied on Up Dish to monitor the quality of the work and conduct drug testing, is at the least inconsistent with its contractual position in relation to Up Dish. It does not support a position that Satellite Solutions' did not have the right to control the work of the Technicians.

4. With regard to the other factors specified in Tenn. Code Ann. § 50-6-102(D), the testimony shows that Satellite Solutions did not pay taxes, employee benefits, sick pay or vacation days. Technicians either provided or were responsible for their own vehicles, tools, equipment and materials. The testimony also indicates that Technicians were free to perform work outside of their relationship with Satellite Solutions, and there is no evidence that the work relationship between Satellite Solutions and the Technicians could not be terminated by any of the parties at any time. The right to terminate a work relationship at will is, however,

contrary to the full control of work activities usually enjoyed by an independent contractor.

Masiere v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982).

5. Once the existence of an employment relationship is established, the employer has the burden of proving the worker was an independent contractor rather than an employee. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Any doubt as to whether the worker is an employee or an independent contractor should be resolved in favor of the former. *Armstrong v. Spears*, 393 S.W.2d 729, 731 (Tenn. 1965); *King*, 2006 WL 2792159, at *8.

6. Tennessee workers' compensation law is intended as a comprehensive scheme to provide broad coverage for injured workers. *CNA v. King*, No. M2004-02911-COA-R3-CV, 2006 WL 2792159, at *5 (Tenn. Ct. App. M.S., Sept. 28, 2006). Under Tenn. Code Ann. § 50-6-405 (Supp. 2009), employers whose operations fall within the scope of the law are required to maintain a policy of insurance to secure any possible workers' compensation liability or, in the alternative, to meet stringent financial requirements in order to establish and maintain the status of a self-insured employer. The statute further provides that "any person engaged in the construction industry, including principal contractors, intermediate contractors, or subcontractors, shall be required to carry workers' compensation insurance." Tenn. Code Ann. § 50-6-113(f)(1) (2008).

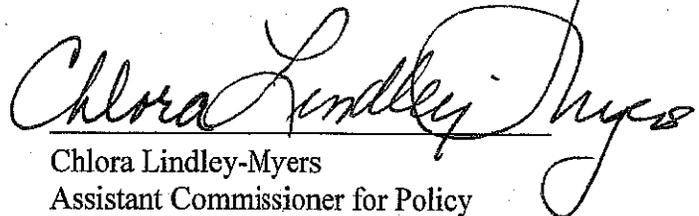
7. Tenn. Comp. R. & Regs. 0780-1-82-10(2) (g) provides that "[o]rders issued under . . . this Rule shall assign the costs of the appeal, in the commissioner's discretion, to the non-prevailing party."

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

1. The 103 installers/service technicians engaged by Daniel Russell, doing business as Satellite Solutions, should be considered employees rather than independent contractors;

2. Satellite Solutions shall pay additional premium to Companion Property and Casualty Group in the amount of seventy two thousand four hundred seventeen dollars (\$72,417) for the July 17, 2010-July 17, 2011 Policy Period within sixty (60) days of this Order.

3. The costs of this matter shall be taxed against the Petitioner, Satellite Solutions.


Chlora Lindley-Myers
Assistant Commissioner for Policy

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 8th, day of February, 2013.


Thomas G. Stovall, Director
Administrative Procedures Division *MFL*

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. 0780-1-82-il.

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)(1)(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,

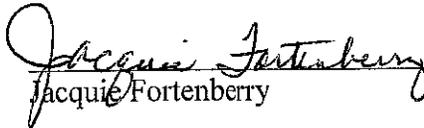
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By depositing same into the United States Mail enclosed in an envelope with adequate postage affixed thereon.

This the 8th day of February, 2013.



Jacquie Fortenberry