IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

BC DEVELOPERS, LLC,	)	
	)	
Petitioner,	)	
	)	
VS.	)	**No. 13-1262-III**
	)	
TENNESSEE DEPARTMENT OF COMMERCIE AND INSURANCE, and CINCINNATI INSURANCE COMPANY,	)	
	)	
Respondents.	)	

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DAVIDSON CO. CHANCERY CT.
BY _____ D.C. & M.

MEMORANDUM AND ORDER AFFIRMING DECISION BELOW

Tennessee law provides an appeal to the Commissioner of the Tennessee Department of Commerce and Insurance for an insured who claims its insurer has misapplied its published insurance rate in assessing the insured's premium. TENN. CODE ANN. § 56-5-309. Then, if the insured does not prevail with the Department, the insured may appeal to Davidson County Chancery Court pursuant to the Administrative Procedures Act section 4-5-322. This is the nature of the above captioned matter.

The Petitioner, as of 2009, is a residential contractor. For the Policy Period of September 18, 2010 through September 18, 2011, the Petitioner had a policy of workers compensation insurance with Cincinnati Insurance Company through the Tennessee Workers' Compensation Insurance Plan, assigned risk pool. Travelers Indemnity

Company provided administrative underwriting, policy issuance, auditing and accounting on the Policy.[1]

The Petitioner is before this Court contesting $17,452.00 of additional/ retrospective premiums billed by Travelers subsequent to the expiration of the Policy Period and approved by the Department in the proceeding below. Assessment of retrospective premiums is provided for in the parties' Policy of Insurance (Hearing Exhibit 9) in Part Five:

> 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.

The Petitioner asserts that the decision below should be reversed because the rate Respondent Cincinnati applied in calculating the retrospective premium inflates the actual risk to Respondent Cincinnati by classifying all the work performed during the Policy Period under the same expensive carpentry work classification. The Petitioner asserts that the work should have been split into different classifications to reflect the tasks actually performed which, in turn, would have decreased the premium assessed.

[1] Whenever Travelers is referred to herein, its capacity is as an agent of Respondent Cincinnati, and when the Court refers to Travelers it is one and the same as Respondent Cincinnati.

Petitioner's Challenges

The Petitioner presents two challenges to the decision below for the Court to review pursuant to Tennessee Code Annotated section 4-5-322. Each shall be examined separately.

The Petitioner's first challenge in that the Administrative Law Judge, contrary to Hearing Exhibit 9, the Policy of Insurance, shifted the responsibility/duty to the Petitioner to "know what information Cincinnati needed to conduct its audit" instead of properly placing on Respondent Cincinnati the duty of soliciting the pertinent information to determine proper classifications from the Petitioner. *Trial Court Brief of the Petitioner, B.C. Developers LLC* November 15, 2013, ("*Petitioner's Brief*") at 7-10. The Court dismisses this challenge.

The substantial and material evidence of record establishes that at all times pertinent Travelers went back and forth with the Petitioner and worked with the Petitioner in an attempt to obtain information allowed by the NCCI rules and manual in assessing the premium. The record does not show that Travelers failed to perform its duty under the Policy, and the record does not show that the Administrative Law Judge misconstrued or misapplied the Policy provisions.

First, these are the relevant Insurance Policy (Hearing Exhibit 9) provisions contained in "Part Five—Premium":

> **F. Records**
>
> You will keep records of information needed to compute the premium. You will provide us with copies of these records when we ask for them.
>
> **G. 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. 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.

Next there is the testimony of Respondent Cincinnati's representative, Ms. Flury, and Hearing Exhibit 8. These establish that from November of 2011 to March 2012, Travelers solicited general and specific records from the Petitioner, and worked with, and exchanged communications and information with the Petitioner. The Record documents in detail that Travelers solicited information from the Petitioner and tried over the course of several months to obtain information from the Petitioner to accurately calculate the premium, but that the information provided by the Petitioner was either invalid, incomplete, missing, illegible or not original source material required by the NCCI Rules which the Insurance Policy provides Travelers must apply in calculating the premium. In

detail, the Record establishes this solicitation and processing of information from the Petitioner by Travelers:

- Policy expires; Travelers sends to Petitioner packet of information for completion for a voluntary audit. Transcript ("TR") 264
- Petitioner does not timely return to Travelers responses to voluntary audit package. TR 264
- Travelers performs estimated audit from insurance application. TR 264
- Bill from estimated audit sent to Petitioner. TR 265
- Petitioner questions bills and sends information to Travelers for audit. TR 266
- Travelers reviews Petitioner's information, sees Petitioner had G&W working for Petitioner. Travelers checks State website and sees G&W's insurance coverage lapsed for 10 of 12 months while G&W worked for Petitioner. Travelers notifies Petitioner it will be billed additional premium for G&W since G&W did not have insurance. The additional premium shall be calculated using a pro rata amount of 10/12s (10 months out of 12 G&W did not have coverage) of the 1099 total dollars paid by Petitioner to G&W. TR 267
- January 2012, Travelers discusses with Petitioner locating records with more specific information on G&W work. TR 268
- Petitioner does not have G&W payroll records to lower premium. TR 269
- Travelers offers to review cancelled checks of G&W's work for Petitioner. Travelers reviews a first and second set of checks, but they are illegible and not broken down between labor and materials. TR 270
- Travelers ask for more specific information to separate labor from materials on checks to G&W. Petitioner says has none. TR 271

— Travelers is able to use NCCI 10% rule to apply a blanket 10% to materials to obtain some reduction in premium for Petitioner. TR 273

— Travelers adds up checks Petitioner wrote to G&W for the 10 months it did not have coverage and deducts 10% for materials. This was the only method Travelers could use under the NCCI rules in the absence of better records. TR 273-274

The foregoing events testified to by Ms. Flury constitute substantial and material evidence that Travelers complied with its duty under the parties' Insurance Policy regarding obtaining information from the Petitioner/Insured and processing it correctly.

Detracting from the forgoing evidence, the Petitioner claims, is that Travelers made a mathematical error in adding up the Petitioner's checks paid to G&W. These errors are that for the 10 months G&W did not have coverage, the checks Petitioner paid G&W totaled $89,169.00. Travelers erroneously reported the total as $86,212 in trial exhibit 3. Also erroneously reported in Exhibit 4 was that the total of the checks paid to G&W, for the 2 months when it did have coverage, was $23,793.50. That should have been $3,627. TR at 278.

Contrary to the Petitioner's argument, these errors are neither substantial nor material evidence and therefore do not detract from Respondent Cincinnati's proof. That is because, as cleared up by the Administrative Law Judge, part of the errors was not used in the premium calculation, and the part that was used in the calculation worked in the Petitioner's favor to lower the premium. TR at 328. When Travelers discovered the error that worked in Petitioner's favor, Travelers gave the Petitioner that benefit and did not adjust the premium upwards.