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**Appeal by Tony's Bakery**  
**Of A Workers' Compensation Insurance Audit Premium**  
**Docket No. W2017-01**

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**Decision and Order**

***Procedural History***

On March 28, 2017, Michelle Rioux, owner of Tony's Bakery (the "Bakery"), appealed to the Division of Insurance ("Division") an additional premium charged by the Ace American Insurance Company ("Ace American") following an audit of the Bakery's 2015-2016 workers' compensation insurance policy.<sup>1</sup> Ace American adjusted the policy premium after review of the Bakery's payroll indicated that the estimated premium was based on projected payroll that was less than the actual payroll during the policy period. The increase reflected inclusion in the actual payroll of compensation paid to drivers who deliver its products. The Bakery's appeal consisted of copies of documents it had filed with the Department of Industrial Accidents ("DIA") on September 18, 2016, appealing a cancellation notice that it had received from Ace American terminating the Bakery's workers' compensation policy for failure to pay premium.<sup>2</sup>

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<sup>1</sup> Such appeals are authorized under a standard Notice to Policy Holder Endorsement to Massachusetts worker's compensation insurance policies.

<sup>2</sup> Because the Bakery obtains its workers' compensation insurance through the assigned risk pool, the insurer may not cancel the coverage without notice to the Workers' Compensation Rating and Inspection Bureau. An employer who objects to the cancellation may obtain a hearing at the DIA. That hearing, however, does not address the correctness of the insurer's audit report. Ms. Rioux called the Division in December 2016, asked about the process for appealing an audit report, and was advised of the procedures for obtaining a hearing at the Division. She was asked to include, with her request, copies of the audit papers and any communications with Ace American or its representatives, and to send copies to Garrett Harris, Esq., the attorney who represented Ace American at the DIA. The Bakery did not pursue an appeal at that time. On March 18, 2017, Ms. Rioux again called me because the Bakery had received a second cancellation notice from Ace American. I advised her that the Division does not have authority to stay cancellation notices and reminded her of the procedures for appealing the audit dispute.

Together with copies of the cancellation notice and premium adjustment notice documenting the audit results, the Bakery included a statement of its reasons for challenging the inclusion of its drivers in the payroll.

The matter was assigned Docket Number W2017-01. Because Ms. Rioux, in her telephone calls, mentioned that counsel for Ace American, Garrett Harris, Esq. was aware of this dispute, on April 5, 2017, I issued an order instructing both parties to submit specific documents and to identify any of those that they had already exchanged. A prehearing conference was scheduled for May 12, 2017.

By letter dated April 19, 2017, Ace American provided copies of the audit documents for the Bakery's 2015-2016 policy, seven pages of communications, dated between June 30, 2016 and October 31, 2016, between the Bakery and the audit resolution specialist who reviewed the audit dispute, and the application for workers' compensation insurance submitted on behalf of the Bakery to the Massachusetts Assigned Risk Pool on April 6, 2015. In addition to its response to the April 5 order, Ace American filed a copy of document requests it had sent to the Bakery.

On April 28, the Bakery submitted a package of documents consisting of a cover letter restating the information included in its 2016 request for a hearing at the DIA, information pages for the Bakery's 2014-2015 workers' compensation policy issued by the Twin City Fire Insurance Company, six pages of communications relating to the audit of the 2015-2016 Ace American policy, and six pages of information on the Bakery's 2016-2017 renewal policy. The Bakery did not include several categories of documents specified in the April 5 order: 1) audits or other documents relating to its 2013-2014 and 2014-2015 workers' compensation policies; 2) a statement of any changes made to the Bakery's delivery operations after April 1, 2015; 3) communications between the Bakery and the Pacheco Insurance Agency; 4) all documents the Bakery provided to Ace American or its representative (*i.e.*, the auditor), that relate to the organizational status of the trucking companies that deliver its product, the status of the drivers as independent contractors, or to their insured status. For that reason, I enlarged the date for providing complete documentation to May 19, 2017, and continued the prehearing conference, first to June 9, 2017 and ultimately, at Ms. Rioux's request, to July 18, 2017.<sup>3</sup> The

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<sup>3</sup> Mr. Harris advised me on May 8 that he had received documents from Ms. Rioux that appear to match those sent to the Division on April 28.

Bakery did not respond to Ace American's document request and submitted no additional documents in response to the April 5 Order or at the subsequent prehearing conferences.

Prior to the scheduled evidentiary hearing, November 15, 2017, Ace American filed a memorandum of law supporting its position that the Bakery's drivers were properly included in the Bakery's payroll base and that the audit premium was properly calculated according to the formula prescribed by the Workers' Compensation Rating and Inspection Bureau of Massachusetts ("WCRIB") for determining how much of the drivers' payroll should be included in that base. At the hearing, Ms. Rioux agreed that the facts about the Bakery's operations were not in dispute. At issue is the application to those facts of the statutes relating to the employer's obligation to provide workers' compensation coverage and the standards for distinguishing between employees and independent contractors.

### ***The Parties' Arguments***

Ms. Rioux has appeared on behalf of the Bakery throughout this proceeding. She states that since it began operations in 1975, it has delivered its products in the same way. However, until it became insured with Ace American in 2015, the drivers' compensation was not included in the Bakery's payroll for purposes of calculating its workers' compensation insurance premium. Ms. Rioux argues that the Bakery's relationship with those drivers demonstrates that they meet the statutory three-prong test for determining that a worker is an independent contractor and that the Bakery therefore does not need to cover them under its workers' compensation policy.<sup>4</sup> She further questions why the drivers' compensation was not included as payroll until the Bakery lost its coverage through the voluntary market for workers' compensation insurance and was placed in the assigned risk pool.

Ace American notes that the Bakery's application for workers' compensation coverage through the assigned risk pool described it as a "Bakery with Delivery." Under the workers' compensation classification system it was assigned to Class Code 2003, Bakery & Drivers, Route Supervisors. The application estimated the remuneration/exposure (*i.e.*, payroll base) for the 2015-2016 policy at \$195,310. The audit report included in the remuneration/exposure base a portion of the gross amounts paid in the policy period to the drivers who deliver the Bakery's

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<sup>4</sup> M.G.L. c. 149, §148B establishes a tri-partite standard for determining when a person performing services for an employer may be found to be an independent contractor. In order to prove that a person is an independent contractor and not an employee, the employer must provide evidence that supports each of the three prongs.

product, thereby increasing the premium base to \$313,690. Ace American addressed the specific evidence that an employer must provide to demonstrate that workers should be classified as independent contractors. It also cited the WCRIB rules and manuals that Ace American used to calculate the additional audit premium.

***Discussion and Analysis***

The Bakery that Ms. Rioux now owns was apparently established by her father. Among the documents she provided is a copy of an information page for the Bakery's 2014-2015 workers' compensation policy estimating its annual premium at \$4,030. The insurer declined to renew the coverage for 2015-2016 and the Bakery, through its insurance agent, obtained coverage with Ace American through the assigned risk pool. At the end of the policy year a physical audit of the policy was performed; as a result the payroll exposure was increased to reflect compensation paid to workers who delivered Bakery products during that policy year. The Bakery contacted the auditor in June, 2016 to object to that result, but the dispute was not resolved in its favor.<sup>5</sup> When the Bakery did not pay the additional premium, Ace American sought to cancel its coverage. The Bakery appealed that cancellation to the DIA.<sup>6</sup> It subsequently appealed to the Commissioner, seeking a decision on the issue underlying the audit premium, the characterization of its drivers as employees or independent contractors.

Every employer purchasing workers' compensation insurance is, for rating purposes, assigned to a business classification. The business classification to which the Bakery is assigned includes employees who manage its operations and manufacture its products, in this case, baked goods, and "drivers and route supervisors." The Bakery contends that in its case those drivers should not be viewed as its employees but treated as independent contractors whom it need not cover under its workers' compensation insurance.<sup>7</sup>

The parties agree that, in determining whether workers are employees or independent contractors, the applicable statute is M.G.L. c. 149, §148B ("§148B"). That statute, in brief, provides that an individual performing a service for another shall be considered to be an

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<sup>5</sup> Ms. Rioux submitted six pages of documents relating to the dispute with the auditor. Those documents did not include a summary of the communications between the Bakery and the auditor or a statement of the final outcome.

<sup>6</sup> In the past, the DIA has heard disputes about the classification of workers for the purpose of requiring workers' compensation insurance. It no longer does so. The status of the Bakery's cancellation appeal is not in the record in this matter.

<sup>7</sup>Its position on appeal is inconsistent with the information provided on its application to the assigned risk pool. It answered "no" to the question whether it utilized independent contractors.

employee, unless the employer provides evidence that its relationship with the worker satisfies three conditions. Over time, a body of case law interpreting and applying each of those conditions has developed.<sup>8</sup> The burden is on the employer to prove that its drivers satisfy each of the statutory criteria and are truly independent.

Section 148B (a)(1) requires the employer to provide evidence “the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact.” Ms. Rioux confirmed that the Bakery has no contract with any of the drivers, stating that her father had established the system. She contends, however, that in fact she has little control over their mode of performance, because the drivers make their own product delivery schedules and, over time, know how much product to deliver to the stores on their route. The drivers are paid commissions based on the amount of product they deliver; the Bakery does not prescribe the number of hours they must work to meet their delivery obligations.<sup>9</sup>

Ace American, citing to extensive case law interpreting the concept of “control and direction,” notes that it focuses on the presence of a “right of control” rather than the extent to which a particular business chooses to exercise control. Ms. Rioux does not assert that she has no authority to terminate any of those individuals, or to exercise oversight over their job performance, as necessary.

Although the current system appears to satisfy the Bakery's delivery operations, that alone is insufficient to support a conclusion that Ms. Rioux, as its owner, is not ultimately responsible for managing those operations and addressing issues relating to performance of an essential function, bringing its product to market. On this record, I am not persuaded that the Bakery has met its burden to demonstrate that the drivers are free from control and direction in connection with their delivery services.

Section 148B (2) requires the employer to demonstrate that the service, in this case product delivery, is performed outside the usual course of its business. The business classification to which the Bakery is assigned contemplates that the bakery business includes

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<sup>8</sup> Ms. Rioux, throughout this proceeding, referred to the question of employee or independent contractor status as a “gray area.” The statute sets standards for determining a worker's status; to prove that its workers satisfy the standards applicable to an independent contractor, an employer must offer relevant evidence sufficient to persuade the decisionmaker that it should prevail.

<sup>9</sup> Section 148B (b) provides that the Bakery's practice of reporting the drivers' compensation to the IRS or the state, without withholding state or federal taxes, is not to be considered in determining independent contractor status.

drivers. The Bakery produces and sells bread; it operates an on-site retail operation and places product for sale in stores and markets in Massachusetts and adjacent states. Ms. Rioux negotiates arrangements with those sales outlets; the drivers' task is to deliver the bakery products to them. The sales outlets pay the Bakery directly. The delivery of bread to sales outlets is unquestionably a part of the usual course of the Bakery's marketing system and the drivers in this case perform an essential service, product delivery, for the Bakery. On this record, the Bakery has not met its burden to demonstrate that the delivery operations performed by the drivers are not integral to its business activities.

Section 148B (3) requires that the employer demonstrate that the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. In order to satisfy this criterion, the Bakery must present evidence that the delivery drivers at issue are entrepreneurs who operate independent established trucking businesses and are not simply providing services to a single entity. Although specifically asked to provide such information, Ms. Rioux did not do so.<sup>10</sup> The Bakery provided no evidence that the drivers in question have developed their own clientele to whom they provide delivery services, issue invoices to the Bakery for delivering its products, advertise their trucking or delivery services, or distribute business cards. None of the drivers, as the owner of an independent business, carries workers' compensation that would cover them, as well as any employees they might hire, in the event of an industrial accident.<sup>11</sup>

On this record, the Bakery has not met its burden to demonstrate that the drivers in question operate independent businesses and that, as business entities, they have elected to purchase workers' compensation coverage.

Ms. Rioux does not dispute the dollar amounts paid to any driver or entity listed on the audit. Her appeal contests only the inclusion, in the Bakery's payroll, of part of that

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<sup>10</sup> Ms. Rioux pointed out that the drivers own their trucks and pay for fuel, and that the Bakery's name is not displayed on them. Vehicle ownership is relevant to the percentage of the drivers' compensation that, under the WCRIB Rules, is included in the Bakery's payroll. The absence of the Bakery's name on those trucks is insufficient to demonstrate that the owner operates a truly independent trucking business.

<sup>11</sup> In Massachusetts, a recent law change means that sole proprietors are eligible to purchase workers' compensation insurance to cover themselves. In 2007 the WCRIB issued a circular letter addressing audit guidelines for determining whether sole proprietors have obtained such coverage; those guidelines were updated in 2012 by Circular Letter No. 2199. Under the WCRIB guidelines, if a sole proprietor provides evidence that he or she has elected to purchase such coverage, payments made to the sole proprietor may be excluded from the payroll of an entity for which the sole proprietor performs services. The person who audited the Bakery's 2015-2016 policy specifically noted that the drivers did not have workers' compensation insurance.

compensation. She questions why that driver compensation was only included after the Bakery became insured through the assigned risk pool. General Laws c. 149, §148B applies to all entities that are required to purchase workers' compensation insurance, whether they obtain a policy through the voluntary market or through the assigned risk pool. Assignment of the Bakery to the pool did not change the applicable rules.

***Conclusion***

I find, on this record, that Tony's Bakery has not met its burden to offer relevant evidence to support its position that the drivers who deliver its product are independent contractors. It has provided no documentation to support its contention that Ace American erroneously included in its payroll audit two-thirds of the amounts paid the drivers who delivered the Bakery's products during the policy in effect from April 7, 2015 to April 7, 2016 or erred in calculating the final audit premium. For those reasons, its appeal is dismissed.<sup>12</sup>

Issued: August 28, 2018

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Jean F. Farrington  
Presiding Officer

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<sup>12</sup> This appeal specifically addresses the 2015-2016 policy audit. Ace American noted that the policy was renewed for 2016-2017 and that the same issue arose again with respect to the premium for that policy. Ms. Rioux indicated that the Bakery made no changes in its delivery operations that might support a different outcome.