

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE DIRECTOR OF INSURANCE**

In the Matter of)	
Soldotna Realty, Inc. v.)	
Alaska National Insurance Co.)	OAH No. 07-0009-INS
_____)	Division Case No. H 06-06

DECISION

I. Introduction

Soldotna Realty appeals a decision of the National Council on Compensation Insurance (“NCCI”) to deny a request to adjust worker’s compensation premium charged by Alaska National Insurance Company. The parties have submitted a written stipulation of the material facts of the case with 22 attached exhibits, and are in agreement that the case presents issues of law only. Review of the record shows that NCCI’s decision was correct.

II. Facts

Soldotna Realty, Inc. is a real estate firm in Soldotna. The firm consists of Martin Radvansky, who is the firm’s licensed broker and sole corporate officer, and six agents. Whether these agents are employees or independent contractors to Soldotna Realty is one of the issues of the case.

On October 6, 2004, Soldotna Realty submitted an application for workers compensation insurance through the Alaska Workers Compensation Insurance Plan. As a servicing carrier under the plan, Alaska National issued a policy effective from October 7, 2004, through October 7, 2005. On October 7, 2005, Alaska National issued a renewal policy effective through October 7, 2006.

On September 30, 2005, Alaska National sent Soldotna Realty a letter reading, in part, “your workers’ compensation insurance premium is based on an estimate of annual payroll. At the end of each policy term, a final audit must be performed. In order to calculate the final premium for the period of 10/07/04 to 10/07/05, we request that you complete the enclosed reporting form.”

Alaska National did complete an audit for Soldotna Realty. On January 13, 2006, Alaska National sent Soldotna Realty a letter advising that it was increasing Soldotna Realty’s estimated

annual payroll from \$28,000 to \$234,000.¹ Alaska National raised the premium for the next policy year accordingly.² This adjustment was based on Alaska National's determination that the workers compensation premium should have been based on payroll payments made to all of the real estate agents working in the firm.

Soldotna Realty challenged Alaska National's determination that payments made to the agents should have been considered in setting the workers compensation premium. Soldotna Realty argued that its agents are independent contractors and therefore not subject to workers compensation. Thus, according to Soldotna Realty, the only proper basis for premium determination was any payroll paid to Mr. Radvansky.

At Alaska National's direction, Soldotna Realty directed its appeal to NCCI.³ Procedurally, it is unclear how NCCI handled the appeal, but it eventually sent Soldotna Realty a letter stating that the Alaska Workers Compensation Review and Advisory Committee had made a determination in Alaska National's favor; according to the letter, "The Committee ruled that **Alaska National is entitled to collect the premium for the disputed real estate agents.**" (emphasis in original).⁴ Soldotna Realty appealed that decision to the director, who assigned the matter to the Office of Administrative Hearings for hearing.⁵

The parties have stipulated to the following facts regarding the relationship of the agents and Soldotna Realty. In order to work as such, real estate agents must be licensed by the state and they must work under the license of a real estate broker. Mr. Radvansky is a licensed broker, and Soldotna Realty is licensed by virtue of Mr. Radvansky's license. During the 2004 and 2005 policy periods, the agents worked under the broker's license of Soldotna Realty.

¹ Exhibit 8.

² Exhibit 9.

³ Exhibit 15.

⁴ Exhibit 18.

⁵ The parties characterize this case as an appeal from the "Alaska Workers Compensation Grievance Committee." Alaska law does not provide for the existence of any such entity. The decision document from which Soldotna Realty appeals is a letter on NCCI letterhead from NCCI's regulatory services manager dated November 14, 2006 (Exhibit 18). This letter is captioned "Re: Decision of the Alaska Workers Compensation Grievance Committee – Inclusion of 'Independent Contractors'." The body of the letter states that its purpose "is to advise all interested parties of the decision made by the Alaska Workers Compensation Review and Advisory Committee (Committee) at its meeting on October 19, 2006." The Alaska Workers Compensation Review and Advisory Committee exists under the authority of 3 AAC 20.300. Its purpose is "to assist and advise the director regarding workers' compensation matters."

As a licensed rating organization in this state, NCCI has a duty under AS 21.39.090 to provide a hearing to insureds aggrieved by the application of its rating system. Regardless of who actually made the decision that is being appealed, NCCI is responsible for the decision. The parties have not raised any objections regarding the procedures of the case.

Soldotna Realty provided office space for the agents, but the agents also worked out of their homes and cars. The agents were responsible for the costs of their own cell phones and computers. Soldotna Realty provided the agents with leads to prospective customers.

All of the agents signed an “Independent Contractor Commission Agreement” with Soldotna Realty. In this agreement the agents represented that they had read and agreed to abide by Soldotna Realty’s policy and procedures manual. The agreement also contained a percentage split by which the agent and Soldotna Realty would share commissions earned by the agent.⁶

The policy and procedure manual (“the Manual”, Exhibit 22) contains a detailed description of the relationship between the agents and Soldotna Realty. The Manual states that “all licensed Associates of Soldotna Realty are independent contractors and are responsible for compliance with the various tax laws as pertains to them,” and it specifies that earnings will be reported in IRS Form 1099-MISC. An agent’s failure to abide by Soldotna Realty’s policies and procedures will be “cause for dismissal.” Associates are required to name Soldotna Realty as a co-insured on their automobile insurance policies.

None of the agents performed services as a real estate agent for any other broker during the relevant time periods. Soldotna Realty compensated the agents based on the commissions they generated from transactions they conducted. Alaska National’s premium was based on the agents’ compensation.

III. Discussion

There is no disagreement in this case that Alaska employers are required to provide workers compensation benefits to their employees, but a person or business that hires an independent contractor is not required to provide workers compensation. The only issue is whether the real estate agents working with Soldotna Realty are employees or independent contractors.

In determining whether a person is an employee or contractor, the circular definitions provided by the statute are not very helpful. According to AS 23.30.395(19), “‘employee’ means an employee employed by an employer as defined in (20) of this section....” Subsection (20) provides that “‘employer’ means...a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state....” These definitions provide no meaningful guidance in determining whether the real estate agents are employees or contractors.

⁶ Exhibit 21.
OAH No. 06-0641-INS

In *Nickels v. Napolilli* the Alaska Supreme Court considered the case of a person who was injured while working on a small family farm that the owners ran in addition to their day jobs.⁷ The farm owners had built a small cabin on the farm, and they offered it rent-free in exchange for labor on the farm. There was no claim in that case the worker/tenant was a contractor, but the farm owners did claim that the contractual agreement was a rental agreement, not an employment contract. The court then considered whether the tenant was also an employee, and looked to its earlier decision in *Searfus v. Northern Gas Co.*⁸ In that case, the court had held that

In evaluating the character of the claimant's work, the trier of fact is to consider the degree of skill involved, the degree to which it is a separate calling or business, and the extent to which it can be expected to carry its own accident burden. Concerning the relationship of the claimant's work to the purported employer's business, the trier of fact is to consider how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.

The *Nickels* court applied these guidelines and found that the worker/tenant was an employee of the farm, not a contractor. The court also considered an argument that workers' compensation laws should not apply because the farm was more in the nature of a "lifestyle choice" than a source of income for the owners. The court found that although the farm was not a primary source of income for the owners, it was nevertheless a business and that "because Nickel's work for Isabella Creek Farm and the Napolillis furthered the business, it is therefore within the scope of the workers' compensation system."

Using the guidelines from *Searfus*, it seems clear that the agents at Soldotna Realty are employees not contractors. The agents sell real estate under the umbrella of Soldotna Realty's broker's license. The agents are hired, or "contracted" because of their unique skills, including specialized licensing. The agents do not work for any other firms, and they work on a continual basis, not just for a limited time or for a particular transaction. The agents work from desks in Soldotna Realty's place of business, and appear to interact with the public as authorized representatives of the firm. Agents' "floor time" is determined by a regular schedule issued by the firm. The agents' work is a regular integral part of the firm's regular work. It is obvious that the work of the agents furthers the business.

⁷ *Nickels v. Napolilli*, 29 P.3d 242 (Alaska 2001).

⁸ *Searfus v. Northern Gas Co.*, 472 P.2d 966, 969 (Alaska 1970).

Soldotna Realty points out that “IRS Publication 15 (Circular E), Employer’s Tax Guide, states that qualified real estate agents are, by law, considered nonemployees. For tax purposes, I have been providing IRS Form 1099-MISC to identify those commissions earned during the year.” Soldotna Realty may be entirely correct on this point, but as it states, an IRS determination is *for tax purposes*. Regardless of whether the agents working at Soldotna are paid and file tax returns (legally and correctly) as independent contractors, it seems almost certain that if an agent was injured on the job, Soldotna Realty would be liable for workers compensation, just as the part-time farmers in the *Nickels* case were. In deciding whether Soldotna Realty should be required to compensate an injured real estate agent, it is highly unlikely that the court would give any consideration to the relative tax status of the agents and the firm.

Alaska National’s policy covers any workers compensation liability incurred by Soldotna Realty, not just liability for injuries sustained by employees listed in the application or policy documents.⁹ Thus, if an agent were injured on the job and filed a claim against Soldotna Realty, regardless of how it views itself and its agents, Soldotna Realty would be liable and Alaska National would be required to pay the claim. Alaska National was correct to set its premium according to its actual risk.

In its written argument, Soldotna Realty states that “hopefully, House Bill 409 will clear this situation up for the future.” In 2006 the legislature added AS 43.30.230(10), which removes from coverage under the workers compensation statute

a person working as a qualified real estate licensee who performs services under a written contract that provides that the person will not be treated as an employee for federal income tax or workers' compensation purposes; in this paragraph, "qualified real estate licensee" means a person who is required to be licensed under AS 08.88.161 and whose payment for services is directly related to sales or other output rather than the number of hours worked.

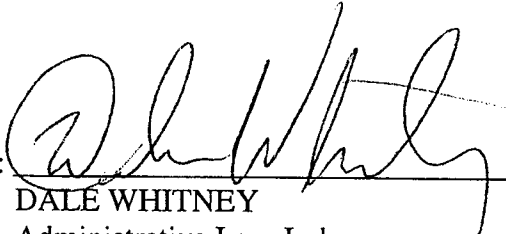
This statute was not in effect during the policy period for 2004 and 2005, and therefore does not apply to this case. The fact that the legislature specifically excepted real estate agents from the statute indicates that, before amended, the statute did cover real estate agents.

⁹ Exhibit 2, page 1 of policy.
OAH No. 06-0641-INS

IV. Conclusion

For the policy years in question, Alaska National is entitled to collect premium for workers compensation insurance based on the payroll of all employees, including real estate agents who may be considered independent contractors for other purposes. NCCI's decision is AFFIRMED.

DATED this 14th day of June, 2007.

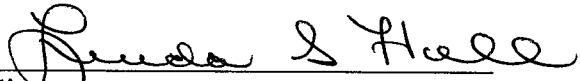
By: 
DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 21.06.080. The Director of Insurance adopts this Decision as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 13th day of July, 2007.

By: 
Signature
LINDA S. HALL
Name
Director
Title