

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

The Revocation of Boiler Inspectors Certificates of
Competency relative to:

FRANK GAGLIARDI; GERALD F. CROSS,
JAMES F. CARBERRY; KEITH D. CHABUT,
RAYMOND C. SNYDER; RAYMOND YURO,
ROBERT J. PRICE; SAMUEL A. GOODWIN,
WILLIAM C. WILKE; THOMAS J. BOORSE

Petitioners

Pursuant to Labor Law Section 204(8)(b).

**REPORT
&
RECOMMENDATION**

GA-08-0131; GA-08-0130
GA-08-0128; GA-08-0129
GA-08-0134; GA-08-0136
GA-08-0133; GA-08-0132
GA-08-0135; GA-08-0127

To: Honorable Colleen C. Gardner
Commissioner of Labor
State of New York

Pursuant to ten separate Notices of Hearing issued in this matter to each of the above-captioned individuals, a hearing was held on January 5, 2011, in Albany, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

At the hearing, the ten separately noticed matters were consolidated into a single case, as the sole issue presented with respect to each of the Petitioners' Boiler Inspector Certificates of Competency is whether their common employer, Arise Boiler Inspection and Insurance Company Risk Retention Group ("Arise"), is a "duly authorized insurance company" within the meaning of Labor Law § 204 (1), which is a prerequisite for the Petitioners to qualify for Boiler Inspector Certificates of Competency. The hearing therefore concerned the investigation made by the Boiler Safety Bureau ("Bureau") of the Department of Labor ("Department") into whether Boiler Inspector Certificates of Competency could be issued to the Petitioners by virtue of their employment by Arise.

APPEARANCES

The Bureau was represented by former Department Counsel, Maria Colavito, Jeffrey G. Shapiro, Senior Attorney, of Counsel.

The Petitioners were represented by Gibbons P.C., Philip W. Crawford, Esq., of counsel.

FINDINGS OF FACT

Each of the above-named Petitioners is an employee of Arise, a non-domiciliary risk retention group formed pursuant to the federal Liability Risk Retention Act (“LRRRA”) codified at 15 U.S.C. §3901, *et seq* (T. 49, 72). Arise is chartered and licensed as an insurance company in the State of Kentucky (T. 87). Arise provides insurance coverage that covers property damage claims of third parties made against its insured for incidents involving boilers (T. 50, 84; Resp. Ex. 1). Arise does not offer first party insurance, which would cover its own insured for physical damage to their property (T. 50, 84). Arise has issued these insurance policies in all fifty states (T. 92-93).

Since 1994, the Department has issued Boiler Inspector Certificates to Arise’s employees (Dept Ex. 1). In 2004, not finding Arise on the list of authorized insurance companies published in the New York State Department of Insurance (“Insurance Department”) Directory, the Department requested assurances that Arise remained an authorized insurance company in New York and that it issued boiler and machinery insurance, which assurances it received from Arise (Dept. Exs. 2, 3). The Department requested and received similar assurances in 2006 and 2008 (Dept. Exs. 4, 5, 8).

In January 2009, Arise informed the Department that it had organized itself as a risk retention group under federal law (Dept. Ex. 11). In February of 2009, the Department requested an opinion from the Insurance Department as to whether Arise was a “duly authorized insurance company” and whether it was licensed to write boiler insurance in New York State (Dept. Ex. 12).

On January 29, 2010, the Insurance Department issued a written opinion that Arise was not an “authorized insurer” within the meaning of Insurance Law §107(a) (10) (Dept. Ex. 13). Since the Insurance Department understood the Department to interpret

the phrase “duly authorized insurance company” under Labor Law §204 in the same manner as “authorized insurer” was interpreted by the Insurance Department under the Insurance Law, the Insurance Department opined that Arise was not “a ‘duly authorized insurance company’ within the meaning of Labor Law §204(1)” (Dept. Ex. 13). The Insurance Department also opined that Arise may not write boiler and machinery insurance in New York because boiler and machinery insurance is “property insurance.” This type of insurance is not “liability insurance,” which provides insurance for claims made against an insured by third parties for damages or losses sustained by those third parties. (*Id.*) Since, pursuant to LRRRA, a risk retention group can write only liability insurance for its members, a risk retention group, including Arise, is not authorized to issue boiler insurance (*Id.*). Therefore, as it cannot issue boiler insurance, Arise cannot be considered an insurance company as that term is defined in state labor regulations, which define an insurance company as a company licensed in the State of New York to write boiler insurance (*Id.*).

In reliance on the Insurance Department opinion, the Department determined that the Petitioners were not entitled to hold Boiler Inspector Certificates of Competency, as they were not employed by a “duly authorized insurance company.” The Department now seeks to revoke the Boiler Inspector Certificates of Competency previously issued to Petitioners (Dept. Ex. 14).

CONCLUSIONS OF LAW

Labor Law § 204(1) requires that the Department inspect at least every two years all boilers covered by that section. NY Labor Law §204 (1). Excepted from that inspection requirement are boilers that are inspected and insured by a “duly authorized insurance company.” NY Labor Law §204 (8). That exemption requires, *inter alia*, that the inspectors of the insurance company hold certificates of competency and that the insurance company comply with the rules of the Commissioner of Labor. *Id.* The rules require that the boiler inspectors be employees of a “duly authorized insurance company.” 12 NYCRR §4-2.3 (c). An insurance company is defined as “a company which has been licensed in this State to write boiler insurance.” 12 NYCRR §4-1.2 (j).

Arise is a non-domiciliary company organized as a risk retention group pursuant to the LRRRA. 15 U.S.C. §3901, *et seq.*¹ Article 59 of the New York State Insurance Law implements the LRRRA in New York.² As a risk retention group operating in New York pursuant to the LRRRA and Article 59, Arise may only write liability insurance for its members. 15 U.S.C. §3901 (a) (4) (G); Dept. Ex. 13 (January 29, 2010 Insurance Department opinion letter). The LRRRA defines “liability” to mean “legal liability for damages ...because of injuries to *other persons, damages to their property, or other damage or loss to such other persons.*” 15 U.S.C §3901 (a) (2) (emphasis added). The Insurance Law restricts boiler insurance to first-party coverage of an insured for loss or damage to an insured’s own property resulting from an explosion. NY Insurance Law §1109 (a) (9). In the opinion of the Insurance Department, boiler insurance does not include coverage for third party loss or damage. Dept. Ex. 13 (January 29, 2010 Insurance Department opinion letter). Since by definition boiler insurance does not include insurance for third party loss or damage, it is not “liability insurance” under the LRRRA. Accordingly, the Insurance Department opines that Arise may not legally provide boiler insurance in New York State. Dept. Ex. 13. That opinion is rational and consistent with the applicable statutory definitions and should therefore be deferred to. *Kurcsics v. Merchant’s Mutual Insurance Company*, 49 N.Y.2d 451, 459 (1980).

Pursuant to regulations promulgated under the Labor Law, an insurance company is defined as a company licensed in the State of New York to write boiler insurance. 12 NYCRR §4-1.2 (j). Since Arise is not legally authorized to write boiler insurance, it cannot meet the definition of an “insurance company.” *Id.* Consequently, it cannot possibly be deemed a “duly authorized insurance company” under Labor Law §204 (8), since by definition it cannot qualify as an insurance company. The Petitioners therefore are not employed by a duly authorized insurance company; their Boiler Inspector Certificates of Competency must be revoked.

¹ The Act is the result of two major pieces of legislation enacted by Congress in the 1980s to redress the issues of the reduced availability of, and skyrocketing premiums for, products liability and commercial liability insurance. *See, Insurance Co. of Pennsylvania v. Cocoran*, 850 F.2d 88, 89-90 (2d Cir. 1988).

² Most states did not allow risk retention groups prior to the passage of the LRRRA. *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913, 914 (2d Cir. 1996).

Arises's contention that such a result is discriminatory in contravention of both the LRRRA and the Equal Protection Clause of the 14th Amendment of the US Constitution is without merit. Regardless of whether the risk retention group is a New York or non-domiciliary risk retention group or whether the company is an insurance carrier organized and licensed in New York or a non-domiciliary insurance carrier licensed to do business in New York, the rule is the same: If a business does not write "boiler insurance," its employees cannot be certified to conduct boiler inspections. As such, it is a law of general applicability designed to protect the public, which is neither preempted by the LRRRA (*see*, 15 U.S.C. § 3902 [a] [4]) nor violative of the Equal Protection Clause of the 14th Amendment to the United States Constitution (U.S. Const. amend. XIV).

In enacting the LRRRA, Congress preempted state laws that would prohibit the formation or operation of risk retention groups. *Mears Transp. Group v. State*, 34 F.3d 1013, 1016 (11th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995). The Insurance Department has approved Arise to write insurance which covers third party property damage arising out of mishaps exclusively involving boilers (Resp. Ex. 2), which is the type of insurance Arise provides to its members (Resp. Ex. 1). Limiting certification of boiler inspectors to employees of companies that write first party boiler insurance does not make unlawful the formation or operation of Arise, or risk retention groups generally. *See, generally, National Home Insurance Co. v. King*, 291 F. Supp.2d 518, 530-531 (E.D. KY 2003). Nor does it confer any commercial advantage to insurers licensed in New York similar to that which occurred in the *Preferred Physicians* case relied on by Respondents. *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913 (2d Cir. 1996). In that case, an additional layer of excess coverage was provided free of charge to practitioners who obtained their primary coverage from a New York licensed insurer. *Id.* at 914-915. Respondents have failed to identify any significant commercial disadvantage that would result from Arises's inability to satisfy the exemption from the requirement that state inspectors conduct the required boiler inspections. *See, Respondents' Proposed Findings of Fact and Conclusions of Law*. There is therefore no showing of legally impermissible "discrimination" within the meaning of the LRRRA or otherwise. *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d at 917-

918. In enacting the LRRRA, Congress intended to preserve the states' traditional role in regulating insurance and protecting the public. *Mears Transp. Group v. State*, 34 F.3d at 1017; 15 U.S.C. §3902 [a] [4]. The Department's position is not inconsistent with that intention.

RECOMMENDATIONS

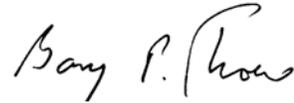
I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Petitioners are not employees of a duly authorized insurance company; and

ORDER that Petitioners Boiler Inspector Certificates of Competency be revoked.

Dated: October 17, 2011
Albany, New York

Respectfully submitted,

Handwritten signature of Gary P. Troue in cursive script.

Gary P. Troue, Hearing Officer