No. 2—10—0217
Order filed March 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE TRAVELERS INDEMNITY COMPANY,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellant,	)	
v.	)	No. 06—L—557
MARKHAM HOME IMPROVEMENTS CORPORATION,	)	Honorable David M. Hall,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The trial court erred in granting defendant summary judgment on plaintiff's complaint for workers' compensation premiums for additional workers; although the workers might have been independent contractors rather than employees, they were engaged in "extra hazardous" activities per the Workers' Compensation Act, and thus per the policy defendant through plaintiff "could" be liable to cover them; thus, summary judgment for defendant is reversed, although summary judgment is not granted to plaintiff, as plaintiff's damages were not sufficiently established.

Plaintiff, the Travelers Indemnity Company, provided workers' compensation insurance for defendant, Markham Home Improvements Corporation. A dispute arose about whether defendant owed additional premiums. Plaintiff sued defendant, asserting that it owed additional amounts for

some of its workers who were not employees. The trial court granted defendant summary judgment. Plaintiff appeals, contending that the trial court erred by not requiring defendant to pay additional premiums for the nonemployee workers because plaintiff was potentially liable to cover them despite their status as independent contractors. We reverse and remand.

Defendant is in the business of home construction and remodeling. Unable to obtain workers' compensation insurance on the open market, it submitted an application to the National Council on Compensation Insurance, which assigned the application to plaintiff. Accordingly, plaintiff issued defendant two policies. The first ran from April 23, 2003, to April 23, 2004. The second was scheduled to run until April 23, 2005, but was cancelled in September 2004 for nonpayment of premium.

Each policy contained the following provision on calculation of the premiums:

"C. 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 the 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."

The policy gave plaintiff the right to set the premiums, and to audit defendant's records, if necessary, to do so.

Plaintiff sued defendant to recover allegedly unpaid premiums. The complaint was dismissed by agreement without prejudice to allow defendant to provide certificates of insurance for Bob Henderson (R. Henderson Construction, Ltd.), Cris Bak (Carpentry Co.), Eric Kotter, Hector Rupitt, Keith Surmin, Larry Majewski, Roy Hardin, Scott Surmin, and Tele Construction & Home Improvement Corp. for the period April 23, 2003 to September 15, 2004.

Plaintiff successfully moved to reinstate the case and the parties filed cross-motions for summary judgment. Plaintiff contended that defendant owed additional premiums for the listed workers. Defendant responded that those workers were independent contractors, for whom it did not have to provide workers' compensation coverage. Plaintiff replied that, despite their status as independent contractors, plaintiff might have been legally required to cover them if they did not have coverage from some other source. The trial court granted defendant's motion and denied plaintiff's motion. After the trial court denied its motion to reconsider, plaintiff timely appealed.

Plaintiff contends that the trial court erred in deciding that defendant did not owe premiums for the additional workers. It argues that, regardless of whether those workers are considered independent contractors, it could have been required to pay benefits to them, and thus was allowed by the policy language to include them in the premium calculation.

We note that defendant has not filed a brief in this court. However, we will consider the merits of the appeal pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp*., 63 Ill. 2d 128, 133 (1976).

The trial court granted defendant summary judgment. Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2—1005(c) (West 2008). We review *de novo* an order granting summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Moreover, the issue raised requires us to interpret the insurance policy. This is a question of law that we also review *de novo*. *Id.* at 108. Where parties file cross-motions for summary judgment, they invite the court to decide the issues as questions of law; however, even where the parties file cross-motions for summary judgment, the court is not obligated to grant summary judgment to either party if factual questions remain. *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 147 (2010).

"Insurance policies are subject to the same rules of construction applicable to other types of contracts." *Nicor, Inc. v. Associated Electric & Gas Insurance Services, Ltd.*, 223 Ill. 2d 407, 416 (2006). A court's primary objective is to ascertain and give effect to the parties' intent as expressed in the agreement. *Crum & Forster Managers Corp. v. Resolution Trust Corp.,* 156 Ill. 2d 384, 391 (1993). In performing that task, the court must construe the policy as a whole, taking into account the type of insurance purchased, the nature of the risks involved, and the contract's overall purpose. *Traveler's Insurance Co. v. Eljer Manufacturing, Inc.,* 197 Ill. 2d 278, 292 (2001); *American States Insurance Co. v. Koloms,* 177 Ill. 2d 473, 479 (1997).

The words of a policy should be given their plain and ordinary meaning. *State Farm Mutual Automobile Insurance Co. v. Villicana,* 181 Ill. 2d 436, 441 (1998). Where the policy provisions are clear and unambiguous, they will be applied as written (*United States Fire Insurance Co. v. Schnackenberg,* 88 Ill. 2d 1, 4 (1981)) unless doing so would violate public policy (*Nicor, Inc.*, 223 Ill. 2d at 416-17).

Plaintiff contends that the policy's plain language provides that it can calculate the premiums due based on the remuneration that defendant paid its workers. "Remuneration" includes not only the wages of officers and employees, but also compensation paid to "other persons engaged in work that could make us liable under *** this policy." Thus, whether defendant owes premiums for non-employee workers depends on whether plaintiff "could" be liable to those workers for workers' compensation benefits.

The Illinois Workers' Compensation Act provides that, if an employee of a subcontractor involved in the construction business does not have workers' compensation insurance, the subcontractor's employee can recover workers' compensation benefits from the general contractor. 820 ILCS 305/1(a)(3) (West 2008). In that situation, the general contractor is considered the subcontractor's workers' "statutory employer" and is liable for workers' compensation benefits to those workers. See *Statewide Insurance Co. v. Brendan Construction Co.*, 218 Ill. App. 3d 1055, 1058 (1991). This provision applies to employers engaged in activities deemed to be "extra hazardous," including remodeling and construction. 820 ILCS 305/3(1), (2) (West 2008).

The statutory scheme makes clear that an entity involved in construction or remodeling may be liable for workers' compensation benefits for the employees of its subcontractors that do not

provide such insurance. This is so even though the subcontractors' employees would be considered independent contractors for other purposes.

In *Wausau General Insurance Co. v. Kim's Trucking, Inc.*, 289 Ill. App. 3d 201 (1997), the court considered a policy provision for calculating premiums payable that was nearly identical to that at issue here. The defendant was engaged in hauling construction debris and occasionally employed outside haulers if it had more work than its full-time drivers could handle. The court held that the phrase "could be liable" did not require "dispositive proof of liability," but rather merely the possibility of liability on Wausau's part. *Id.* at 204. The court rejected the defendant's argument that liability was precluded if its outside haulers were independent contractors, holding that, because the defendant was engaged in an ultrahazardous activity, it might have been obligated to provide coverage even if the haulers were deemed independent contractors. *Id.* at 206-07.

Wausau is virtually indistinguishable from this case. It is undisputed that defendant is engaged in construction and remodeling, which the Act considers hazardous activities. Thus, defendant, through plaintiff, "could" be required to provide workers' compensation benefits to its subcontractors' employees, even though the subcontractors and their employees might be considered independent contractors for other purposes. Accordingly, the trial court erred by focusing exclusively on whether the outside workers were independent contractors.

The question of damages, *i.e.*, the amount of additional premiums due, remains unresolved. In its brief, plaintiff asks us to grant its motion for summary judgment. However, its brief does not list a dollar amount of damages, or provide a basis to calculate such an amount. Plaintiff's summary judgment motion sought $128,100 but, other than referring to a "premium audit," does not explain how that amount was calculated. Moreover, plaintiff appears to concede that defendant provided

a certificate of insurance for at least one of its subcontractors covering part of the policy period. Plaintiff further acknowledges that at least some of defendant's subcontractors appear to be sole proprietors. Sole proprietors engaged in extra hazardous activities are automatically covered unless they affirmatively opt out of coverage. See *Country Mutual Insurance Co. v. Wagner's Bulldozing*, 179 Ill. App. 3d 710, 712-13 (1989). While plaintiff argues that defendant has not provided proof that any of these subcontractors did not opt out of coverage, plaintiff has not provided proof that they did, **or did not,** and, as the summary judgment movant, plaintiff has the burden of proving its right to judgment. *Rice v. AAA Aerostar, Inc*, 294 Ill. App. 3d 801, 805 (1998) (summary judgment movant bears burden of persuasion and initial burden of production). We conclude that there is insufficient information in the record to establish plaintiff's damages. We therefore remand the cause for further proceedings on that issue.

The judgment of the circuit court of Lake County is reversed and the cause is remanded.

Reversed and remanded.