MBW

BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE

RECEIVED
2014 SEP 29 AM 10: 45
SECRETARY OF STATE

IN THE MATTER OF:	)	
	)	
TELFORCE GROUP	)	**Doc. No.: 12.28-122559A**
	)	**WC Appeal – Insurance**
and	)	
	)	
BERKLEY REGIONAL INSURANCE COMPANY	)	

FINAL ORDER

This matter was heard on June 23, 2014 before the Honorable Mattielyn Williams, Administrative Law Judge, appointed by the Secretary of State, with Maliaka Bass, Chief Counsel for Consumer Affairs and Administration of the Tennessee Department of Commerce & Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner Designee, Ms. Bass makes the final determination as to the findings of fact and conclusions of law in this matter. The Petitioner, Telforce Group, was represented by Attorney Randall K. Winton. The Respondent, Berkley Regional Insurance Company, was represented by Attorney J. Allen Callison.

JURISDICTION

The Commissioner of Commerce & Insurance ("Commissioner") has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-309(b), which provides:

> Every insurer and rate service organization shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard on written request to review the matter in which the rating system has been applied in conjunction with the insurance afforded. If the insurer fails to grant or reject the request within thirty (30) days, the applicant may proceed in the same manner as if the application had been rejected. Any party affected by an action of the insurer on the request may, within thirty (30) days after written notice of the action, appeal to the commissioner who, after a hearing held upon not

> less than ten (10) days' written notice to the appellant and to the insurer, may affirm, modify, or reverse the action.

ISSUES

The subject of this hearing was whether Berkley is owed additional premium based on a post-coverage audit which recommended several classification adjustments. The disputed premium arises over the classification of certain Telforce temporary employees who reside in Kentucky and were assigned to work for a Missouri-based telecommunications company. Furthermore, the parties dispute which classification code should be applicable to the work performed by these employees.

Berkley contends that it is owed $33,761 in additional premiums. Telforce concedes that it owes, but has not yet paid, $16,989.60 in additional premium. The difference between these two figures, $16,771.40 represents the monetary value of the difference in position the parties believe is the appropriate rating classification. Additionally, Berkley asks that prejudgment interest be awarded on the $16,989.60 amount Telforce concedes that it is owed but has not yet paid.

Upon consideration of the record, it is determined that Berkley is owed $33,761 in additional premiums. Furthermore, Berkley's request for prejudgment interest is denied.

This decision is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Telforce Group, LLP ("Telforce") is a Tennessee Limited Liability Partnership engaged in the business of providing temporary staffing to telecommunications companies. Its principal offices are located in Nashville, Tennessee.

2. The Tennessee Workers' Compensation Insurance Plan ("TWCIP") is a statutory workers' compensation insurance plan to provide coverage for employers unable to obtain such

coverage through the voluntary market, the market of "last resort" for workers' compensation insurance in Tennessee.

3. Berkley Regional Insurance Company ("Berkley") is an insurance company licensed to sell workers' compensation insurance coverage in Tennessee and was at all relevant times the underwriting carrier for Telforce's workers' compensation insurance through the TWCIP.

4. Telforce contracted for worker's compensation insurance through the TWCIP with Berkley with an effective date of February 25, 2012. Telforce cancelled this policy on January 28, 2013.

5. Upon cancellation, Berkley conducted a final premium audit to determine if any additional premium was due under the policy.

6. This audit determined that additional premium in the amount of $35,100 was due.

7. Telforce disputed the findings of this audit. Telforce's objections were denied by Berkley.

8. Telforce appealed the additional premium assessment to Aon as the TWCIP administrator. Aon denied Telforce's appeal.

9. On June 26, 2013, Telforce filed an appeal with the Department.

10. After conducting discovery pursuant to this appeal, Berkley voluntarily amended its premium assessment to $33,761.

11. The applicable premium rates are based upon determining the appropriate classification code ("code") found in the National Council on Compensation Insurance Basic Manual ("NCCI Manual") and applying the code to a state-based multiplier. Therefore, to arrive at the proper premium rate, both the appropriate job classification code and the state where the employment was based must be ascertained.

12. Berkley contends that Telforce employees performed work for a telecommunications company located in Missouri. Berkley further contends that some or substantially all of this work was done by Telforce employees while based out of Missouri. Based on this, Berkley believes that Missouri's rates should be determinative of the premium owed for work done on behalf of the Missouri-based business. Telforce believes that Kentucky rates should be determinative since the affected employees are all resident in Kentucky.

13. Berkley further contends that code 7601 should be applicable to the work done by these employees. Telforce believes that code 7600 is applicable.

14. Code 7600 "includes operation, installation, maintenance, and extension of overhead and underground lines and service connections including line installation within a building." However, code 7600 is only "applied to all employees of telecommunications companies other than those employees working within offices or exchanges."

15. Code 7601 "is applied to contractors engaged in telephone, telegraph or fire alarm construction. It is an all-inclusive classification in that it applies to all work normal and incidental to the construction of such lines when undertaken by an individual contractor. . . . Operations contemplated by this code include drivers; erecting poles, cross-arms and insulators; stringing overhead lines or lead sheath cables used for multiple circuits; and laying underground cables."

16. Berkley further contends that some of the affected employees should be classified under code 5474, which is "applied to painting contractors engaged in painting provided such work is not otherwise classified in the manual . . .," based upon the actual tasks performed.

17. Telforce contends that these employees in question should be classified based on Kentucky's rate code 7600, which has a remuneration rate of $6.50 per $100 of payroll. Berkley contends that the employees should be classified under Missouri's rate code 7601, which has a

remuneration rate of $11.74 per $100 payroll, and 5464, which has a remuneration rate of $11.65 per $100 payroll.

18. Ronald Deese, president and founder of Telforce testified that his company employs individuals on an intermittent basis and who are assigned to work in any of four different states depending on the location where work is available. Deese further testified that it is his company's policy to classify employees as being employed in the state where they reside. The employees at issue here all resided in Kentucky and were thus classified as Kentucky employees by Telforce.

19. Deese testified that in May of 2012, Telforce was engaged by Midwest Underground Technology, Inc., ("MUTI") an Illinois based company that also operates out of an office in Lee's Summit, Missouri. Telforce was engaged by MUTI to install equipment on cell phone towers. The Telforce workers would obtain tools and equipment from MUTI's facility in Missouri and from there dispersed to multiple job sites in several adjoining states.

CONCLUSIONS OF LAW

1. In accordance with Tenn. Comp. R. & R. 1360-04-01-.02(3) and (7), the Petitioner, Telforce, bears the burden of proof in proving by a preponderance of the evidence that the facts alleged in the Petition are true and that the issues raised therein should be resolved in its favor.

2. Tenn. Code Ann. § 56-5-320(c) requires each insured to be a member of the designated rate service organization and to adhere to a uniform risk classification system filed by such organization and approved by the Commissioner.

3. Pursuant to Tenn. Code Ann. § 56-5-320, NCCI is the Commissioner's designated rate service organization for workers' compensation insurance.

4. Missouri Revised Statute § 287.110 provides that the Missouri Workers' Compensation Act applies (1) to all injuries sustained within the state; (2) all contracts of employment in the state; or (3) all employments principally localized in the State.

5. Kentucky Revised Statute § 342.670 provides that, in addition to injuries sustained within Kentucky, the Kentucky Workers' Compensation Act also applies to such employees if (1) his or her employment is principally localized in Kentucky; (2) he or she is working under a contract of hire made in Kentucky for work not localized in any state; (3) he or she is working under a contract of hire made in Kentucky for work in another state whose workers' compensation law is not applicable to his or her employer; or (4) he or she is working under a contract of hire made in Kentucky for work outside the United States and/or Canada.

6. Upon reviewing the record in this matter, it is clear that the employment at issue in this case, for determining which jurisdiction's worker's compensation rates apply, was principally localized in Missouri. Moreover, Telforce has failed to prove, by the preponderance of the evidence that the rates of any state other than Missouri should apply.

7. This is not a case where the employees maintained an ongoing and indefinite employment relationship with Telforce. Employees were hired on a temporary basis to work only on specific jobs that Telforce was able to obtain a contract to fill. Presumably these employees were only promised employment for the duration of the contracted work to be done with no guarantee that future employment on behalf of MUTI or another telecommunications provider in Missouri or elsewhere would be forthcoming. While the employees were working on the job at issue, they were ultimately working at the behest of MUTI. Instructions for daily tasks came out of MUTI's Missouri facility. Furthermore, tools and materials were obtained from MUTI's Missouri facility. In contrast, the strongest connection to Kentucky is that it is the place

where the workers resided. There is no proof in the record that MUTI conducted extensive operations focused in Kentucky.

8. The only evidence that Telforce presented in support of their contention that Kentucky's rate should apply is that the workers resided in Kentucky and that Telforce considered these employees to be Kentucky based. This evidence is insufficient to prove by a preponderance of the evidence that Kentucky's rates should prevail over Missouri's for a Missouri based client.

9. The next issue for review is whether rate code 7600 should apply, as argued by Telforce, or if codes 7601 and 5474 should apply. Here Telforce again failed to prove by a preponderance of the evidence that rate code 7600 should apply.

10. Rate code 7600 applies to any telecommunications workers who work outside of an office setting. In contrast, rate codes 7601 and 5474 apply more specifically to construction and painting duties. The workers here were not engaged in general and routine out-of-office duties one would expect of regular employees for a telecommunications companies. These workers were engaged in installation of equipment at mobile phone towers and in painting buildings and equipment. Accordingly, Telforce has failed to prove by a preponderance of the evidence that code 7600 should be the applicable code for the work performed by its employees.

11. Berkley further requests in its pleadings for an award of prejudgment interest on the $16,989.60 that Telforce concedes it is owed but has not yet paid. Berkley cites Tenn. Code Ann. § 47-14-123 as authority for the Commissioner to award prejudgment interest.

12. Tenn. Code Ann. § 47-14-123 states as follows:

> Prejudgment interest, i.e. interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum . . . . In addition, contracts may expressly

> provide for the imposition of a same or different rate of interest to be paid after breach or default within the limits set by § 47-14-103.

13. Berkley does not address in their brief whether the Commissioner has the authority under Tenn. Code Ann. § 47-14-123 to award prejudgment interest. Telforce's pleadings are silent on the issue of prejudgment interest.

14. The Commissioner is charged by Tenn. Code Ann. § 56-5-309(b) with providing a venue for an aggrieved insured to contest the application of an insurer's rating system. The Commissioner sits in an administrative capacity to hear evidence and issue findings of fact and conclusions of law on the rate classification determined by the insurer. The Commissioner's authority in this matter is entirely prescribed by statute and while certain trappings of a court are sometimes utilized, the Commissioner does not exercise the broad powers of a judge or jury sitting in a court of law or equity. The administrative review authority granted to the Commissioner by the General Assembly must be exercised in the context of the Tennessee Uniform Administrative Procedures Act (UAPA). Tenn. Code Ann. § 4-5-301, *et. seq.* There is nothing in Tenn. Code Ann. § 56-5-309(b) or the UAPA which would give the Commissioner to render a money judgment or "damages." The only authority granted by Tenn. Code Ann. § 56-5-309(b) is to give the Commissioner the power to resolve an insured's dispute as to the rating applied by an insurer. A review of the procedural rules found in the UAPA show there is likewise no authority to give, in any situation applicable to this case, one party an award of money damages or interest in favor of another party. While this order, assuming it becomes a final order upon the exhaustion of any appeal, conclusively determines the legal relationship between the parties as to the applicable insurance rates that should be applied, it does not constitute a money judgment for damages. Should a party who finds itself with the status of a creditor as a result of this hearing be unable to collect what is owed, such a party would

presumably then be free to avail itself of a court exercising the appropriate jurisdiction that is empowered to enter a judgment upon which execution could be taken.

As this proceeding is in an administrative hearing and not before a Court of law or a jury, and as there is no authority under Tenn. Code Ann. § 56-5-309(b) for the Commissioner to award money damages to one party or another, the Commissioner lacks the authority to award prejudgment interest under Tenn. Code Ann. § 47-14-123.

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED:**

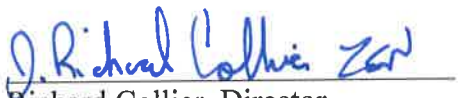
1. The Petition requesting that the applicable rate codes as determined by Berkley Regional Insurance Company be modified is DENIED. The rate codes as determined upon conclusion of the retrospective rating audit are AFFIRMED. Accordingly, it is determined that Telforce Group owes Berkley Regional Insurance Company $33,761.

2. Berkley Regional Insurance Company's motion for prejudgment interest is DENIED.

3. The costs of this matter shall be taxed against the Petitioner, Telforce Group.

Maliaka Bass
Commissioner Designee

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 29 day of September, 2014.



Richard Collier, Director
Administrative Procedures Division

NOTICE OF APPEAL PROCEDURES

Review of Final Order

This Final Order is issued pursuant to Tenn. Comp. R. & Regs. 0780-1-82-. 10. Any party who is aggrieved by this Final Order is entitled to judicial review pursuant to Tenn. Code Ann. § 4-5-322. See Tenn. Comp. R. & Regs. 0780-1-82-il.

Tenn. Code Ann. § 4-5-322 provides in relevant part:

(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method ofjudicial review.

* * * * *

(b)(l)(A) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon.

*****

(2) In a case in which a petition for judicial review is submitted within the sixty-day period but is filed with an inappropriate court, the case shall be transferred to the appropriate court. The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition for reconsideration. Copies of the petition shall be served upon the agency and all parties of record, including the attorney general and reporter, in accordance with the provisions of the Tennessee Rules of Civil Procedure pertaining to service of process.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing that shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the court, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied. The reviewing court shall not consider a stay unless notice has been given to the attorney general and reporter; nor shall the reviewing court consider a stay unless the petitioner has previously sought a stay from the agency or demonstrates that an agency ruling on a stay application cannot be obtained within a reasonable time.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the within and foregoing document has been sent by U.S. Mail, postage prepaid, to the following on this 29th day of September, 2014:

J. Allen Callison
Eraclides, Gelman, Hall, INdek, Goodman, & Waters, LLC
2908 Poston Ave, Suite 101
Nashville, TN 37203

Randall K. Winton
Winton Law, PLLC
7003 Chadwick Drive, Suite 151
Brentwood, TN 37027

Michael R. Shinnick,
Workers Compensation Manager

STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
Insurance Division – Policy Analysis Section
4th Floor, 500 James Robertson Parkway
Nashville, TN 37243-1133

Phone (615) 741-2825 **Fax (615) 741-0648**

RECEIVED
2014 SEP 29 AM 10: 45
SECRETARY OF STATE

MEMORANDUM

TO: Administrative Procedures Division

FROM: Jacquie Fortenberry, Administrative Services Assistant

DATE: September 29, 2014

RE: Filing of Final Order
TelForce Group and Berkley Regional Insurance Company
Docket No. 12.28-122559A
Workers' Compensation Rate Appeal Hearing

Please find enclosed the original and one copy of the Final Order on the above styled case. Please file the original and stamp the copy filed for our records. I have enclosed a self-addressed messenger mail envelope for your convenience in returning the stamped copy to me.

Please feel free to contact me at (615) 532-5340 if you have any questions.

Thank you.

Enclosures