

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

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IN THE MATTER OF:

RANGEL'S WORKFORCE, INC.

and

**LIBERTY MUTUAL INSURANCE
COMPANY**

SECRETARY OF STATE
Doc. No.: 12.28-132670-A
WC Appeal – Insurance

FINAL ORDER

This matter was heard on June 20, 2016, before the Honorable Leonard Pogue, Administrative Law Judge, appointed by the Secretary of State, with Maliaka Bass, Deputy General Counsel of the Tennessee Department of Commerce and Insurance (“TDCI”), sitting as Designee of the Commissioner of TDCI (“Commissioner”). As the Commissioner’s Designee, Ms. Bass makes the final determination as to the Findings of Fact and Conclusions of Law in this matter. The Petitioner, Rangel’s Workforce, Inc. (“Rangel’s Workforce”), is a corporation and was represented by attorneys Blakeley Matthews and Peter Robison. The Respondent, Liberty Mutual Insurance Company (“Liberty Mutual”), was represented by attorney Scott Crosby.

JURISDICTION

The 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 connection 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 the 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.

ISSUE

The subject of this hearing was whether Rangel's Workforce is responsible for payment of additional premiums to Liberty Mutual for the policy period from August 8, 2014, to August 8, 2015, for coverage of Rangel's Workforce employees who were additionally covered by independently procured workers' compensation policies during the policy period.

Upon consideration of the record and for the reasons stated below, it is determined that the petition brought by Rangel's Workforce is **not** well taken and therefore **DENIED**.

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

FINDINGS OF FACT

1. Rangel's Workforce is a company that has an employee leasing arrangement with other Tennessee based companies. Under these arrangements, Rangel's Workforce is the employer of record for employees assigned to work at the behest of other companies. Rangel's Workforce employees are under the exclusive control of the client companies.

2. As part of its contractual arrangements, the companies that lease employees from Rangel's Workforce are responsible for obtaining and funding workers' compensation coverage for the employees assigned by Rangel's Workforce.

3. Both parties concede that the employees at issue in this case were fully and independently covered by valid workers' compensation policies obtained by the companies that controlled and directed the work performed by Rangel's Workforce employees.

4. Rangel's Workforce, in an arrangement with two prior insurers under the assigned risk plan, had obtained multiple coordinated endorsements on its workers' compensation policies

to document the employees that would not be covered under the Rangel's Workforce workers' compensation policy.

5. At no time during the policy period in dispute here was Rangel's Workforce a registered Professional Employer Organization ("PEO") under Tennessee law. Rangel's Workforce contends that it did not need to register as a PEO based on its business model. Liberty Mutual contends that Rangel's Workforce's non-registration as a PEO renders it impossible for it to enter into multiple coordinated endorsements for workers' compensation policies to have client businesses assume the obligation to cover Rangel's Workforce employees.

6. On August 7, 2014, Rangel's Workforce submitted an application for workers' compensation coverage under the assigned risk plan. This application noted that Rangel's Workforce did lease its employees to a client company and that it was seeking coverage for the leased employees. The application did not request that a multiple coordinated endorsement be placed on the endorsement. The application simply and effectively asks for coverage of all Rangel's Workforce employees.

7. On September 2, 2014, Liberty Mutual issued a workers' compensation policy to Rangel's Workforce with an effective date of September 8, 2014, valid to September 7, 2015. This policy did not contain any endorsement excluding any employees covered by other valid and effective workers' compensation policies.

8. Liberty Mutual employee Brian Wyatt conducted an initial policy audit in October of 2014. Mr. Wyatt indicated that Liberty Mutual would issue an exclusion endorsement in line with what Rangel's Workforce had received from prior assigned risk carriers for the employees covered by other policies. This position was again confirmed by Liberty Mutual employee Shannah Clements on November 25, 2014. This position was likewise

confirmed by Aon, serving as the plan administrator, who likewise confirmed that prior assigned risk policies had been issued with exclusion endorsements.

9. On December 17, 2014, Liberty Mutual reversed itself and determined that it was unable to issue an exclusion endorsement, notwithstanding the issuance of a pre-existing valid policy for the Rangel's Workforce employees, because Rangel's Workforce had not been licensed as a PEO.

10. On February 26, 2015, Aon, as plan administrator, issued a final determination that the entire payroll of Rangel's Workforce was covered by the Liberty Mutual policy and thus Liberty Mutual was owed for the full balance of premiums for all of its employees, including those covered by another workers' compensation policy. This appeal follows.

CONCLUSIONS OF LAW

1. In accordance with Tenn. Comp. R. & Regs. 1360-04-01-.02(3) and (7), Rangel's Workforce bears the burden of 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. Rangel's Workforce has failed to show that, subsequent to issuing a policy, Liberty Mutual was obligated to amend the coverage by issuing a multiple coordinated policy endorsement that would effectively exclude its employees who were covered by a workers' compensation policy obtained by another employer. The application submitted by Rangel's Workforce does not request that any of its employees be excluded from coverage or from part of its payroll. Instead, the application plainly requests coverage for all employees. Liberty Mutual fulfilled its obligations under the assigned risk plan and bound coverage effective September 8, 2014.

3. PEOs are required to register with TDCI. Tenn. Code Ann. § 62-43-109. A PEO so registered would be required to delineate the terms of the relationship between the PEO and the client company, including determining the responsible party for providing appropriate insurance coverage. Tenn. Code Ann. § 62-43-108.

4. Rangel's Workforce was not a registered PEO. Therefore, Rangel's Workforce was obligated to cover its employees under its own workers' compensation program. To satisfy its obligation, Rangel's Workforce sought coverage under the assigned risk plan. Had Rangel's Workforce been a registered PEO, and the responsibility for providing workers' compensation coverage been so transferred to its client, Liberty Mutual would have been obligated to issue an endorsement to the policy excluding those employees from coverage and absolving Rangel's Workforce of premiums for the coverage on its policy. *See* Basic Manual Rule 4.B.4.b (Respondent's Exhibit 4). Absent this, Liberty Mutual was within its rights to determine that the policy issued on September 8, 2014, covered all Rangel's Workforce employees and that they were under no obligation to retroactively modify or limit the scope of their coverage.

5. Rangel's Workforce argues that Liberty Mutual should be estopped from asserting that additional premiums are owed because of the initial indication by Aon, the plan administrator, and certain Liberty Mutual employees, that an exclusion endorsement for the hired out employees would be added to the policy. This argument is without merit. It is not unreasonable for an assigned risk plan carrier such as Liberty Mutual to take a relatively short four-month period of time to determine that the insured's proposed arrangement was in conflict with the Basic Manual. Rangel's Workforce and Liberty Mutual had no prior business relationship. As an assigned risk plan carrier, Liberty Mutual was obligated to accept Rangel's

Workforce's application for coverage at the rates and terms specified by the assigned risk program.

6. While regrettable that Rangel's Workforce is responsible for the cost of redundant coverage for its workers, it is not the obligation of Liberty Mutual to make a close scrutiny of the particulars a prior assigned risk carrier may have entered into with the insured. It is incumbent upon the insured and the insured's agent to provide the appropriate documentation to the assigned risk plan carrier and to have properly vetted the coverage sought. Once bound, Liberty Mutual was obligated to promptly pay any valid claims submitted by Rangel's Workforce employees. This risk of loss was not speculative. The Tennessee Court of Appeals has determined that the existence of an insurance company's duty to defend an insured creates valid, compensable coverage. *Cont'l Cas. Co. v. Theraco, Inc.*, 437 S.W.3d 841 (Tenn. Ct. App. 2014). Liberty Mutual's potential liability exceeds the "duty to defend" requirement found in *Theraco*. Liberty Mutual would be liable for defending a claim presented by any injured Rangel's Workforce employee, had such an employee chosen to present their claim to Liberty Mutual instead of another insurer who had issued a policy covering the same work.


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

1. That the request for relief contained in the Petition is denied. The Petitioner owes additional premium to Liberty Mutual in the amount of \$137,874.85 as found in the final audit.

2. The costs of this matter shall be taxed against the **Petitioner**, Rangel's Workforce.


Maliaka Bass
Commissioner's Designee

Filed in the Administrative Procedures Division, Office of the Secretary of State, this ____ day of September, 2016.

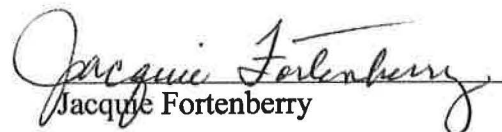

Richard Collier, Director
Administrative Procedures Division

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 30th day of September, 2016:

Blakeley Matthews
Peter Robison
Cornelius & Collins, LLP
PO BOX 190695
Nashville, TN 37219

Scott J. Crosby
Burch, Porter, & Johnson, PLLC
130 North Court Ave.
Memphis, TN 38103


Jacquie Fortenberry

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-.11.

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 of judicial review.

* * * * *

(b)(1)(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.