IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

TOWERS CONSTRUCTION SERVICES, LLC,	)	
Petitioner,	)	FOG, TT
v.	)	**No. 12-0322-IV**
STATE OF TENNESSEE, DEPARTMENT OF COMMERCE AND INSURANCE, and AMERICAN INTERSTATE INSURANCE CO.,	)	
Respondents.	)	

MEMORANDUM OPINION & ORDER

Before the Court is a petition for judicial review of the January 3, 2012 Final Order entered by the Commissioner of the Department of Commerce and Insurance ("the Department"), declaring that American Interstate Insurance Company appropriately included per diem in payroll and ordering Towers Construction Services, LLC to pay American Interstate past due premiums in the amount of $21,694.00. For the foregoing reasons, the Court AFFIRMS the Final Order.

I. Findings of Fact

The Court hereby adopts the following findings of fact as made by the Commissioner's Designee Marie Murphy[1] in her January 3, 2012 Final Order:

1. The Commissioner of Commerce and Insurance (the "Commissioner") has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-309(b).

[1] As the Commissioner's Designee, Ms. Murphy made the final determination as to Findings of Fact and Conclusions of Law in this matter.

2. Towers Construction Services, LLC ("Towers") is a limited liability company, of which Ubaldo Torres is the sole member, that is based in Kingsport, Tennessee and is engaged in the construction business.

3. American Interstate Insurance Company ("American Interstate") is an insurance company, which at all times relevant, held a certificate of authority to sell workers' compensation coverage in Tennessee.

4. American Interstate provided workers' compensation insurance coverage for Towers employees from May 3, 2007 through May 3, 2010.

5. On May 5, 2008, American Interstate issued Workers Compensation and Employer Liability Policy Number AVWCLA1710832008 (the "Policy") providing workers' compensation insurance coverage for Towers employees for the period May 3, 2008 through May 3, 2009 (the "Policy Period").

6. The terms of the Policy provide in pertinent part as follows:

GENERAL SECTION

A. The Policy

> This policy includes at its effective date the information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in item 1 of the information Page) and us (the insurer named on the information Page). The only agreements relating to this insurance policy are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued to us to be part of this policy.
>
> * * * *

PART FIVE – PREMIUM

A. Our Manuals

All premiums for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

* * * *

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 insurance obligations.

* * * *

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

* * * *

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

7. Towers assigned some of its employees to work on a project in Campti, Louisiana during the Policy Period.

8. Towers paid a per diem of $80.00 to its employees, up to $200.00 to supervisors, who were not from Campti, Louisiana.

9. Towers did not instruct its employees who were paid a per diem to retain receipts for their expenses or place any condition on how per diem payments were to be used.

10. Towers paid a total of $1,292,318.00 in per diem to its employees during the Policy Period.

11. American Interstate determined that the amount of per diem payments to Towers employees which was over $30.00 should be included in payroll for the purpose of determining final premium and that the total of the per diem payments over $30.00 during the Policy Period was $1,133,823.00.

12. American Interstate did not request receipts for per diem payments to Towers employees and did not include per diem payments in payroll in calculating premium for the previous, May 3, 2007 – May 3, 2008 policy period.

13. On August 7, 2009, Towers' insurance agent, Andrew Darlington, sent a letter to the National Council on Compensation Insurance ("NCCI") disputing the inclusion of per diem payments made to Towers employees while working away from their local work area. Mr. Darlington stated that the $80.00 per diem payments to Towers employees should be excluded because the amount reimbursed was a valid business expense, paid separately and documented, and was a "fair estimate of the expenses incurred by the workers." Mr. Darlington contended that NCCI Rule 2-B-2-h allows for a fair estimate of actual expenses and that receipts were not, therefore, required.

14. On August 12, 2009, the Audit Specialist for American Interstate, Jimmie Lea Lewis, sent a letter to Towers requesting receipts for "the expenses being disputed" and stated that the audit dispute would be closed if the receipts requested were not received by American Interstate by August 19, 2009.

15. On September 2, 2009, the Regulatory Services Manager for NCCI, Maureen Longanacre, sent a letter to Towers advising that, based on Rule 2-B-2-h, Towers must show records of actual receipts in order to exclude per diem payments of more than $30.00, or otherwise "settle for the flat expense [$30.00] as stated in the Note to the Rule." Ms. Longanacre further advised that NCCI had found "no violation of the approved rules" and that Towers could request a review of such determination through the Tennessee Internal Review Panel by close of business September 24, 2009.

16. On September 23, 2009, American Interstate sent a copy of the revised final audit of the Policy to Towers, indicating a premium due of $21,729.00 which, after taking into consideration a credit of $35.00, left an account balance of $21,694.00.

17. On November 3, 2009, NCCI's Tennessee Internal Review Panel issued a Notice of Decision stating that:

> ... Towers did not provide documents confirm (sic) that the amounts paid to employees are for valid business expense(s), and pursuant to *Basic Manual* Rule 2-B-1-p, the carrier [American Interstate] correctly included the amount above $30.00 per day in the premium calculation.

18. Towers filed an appeal with the Department of Commerce and Insurance on December 4, 2009.

19. American Interstate insured American Industrial Maintenance ("AIM") from June 26, 2009 to June 26, 2010.

20. Teresa Jett ("Ms. Jett"), the office manager of AIM, testified by affidavit signed on September 2, 2010 that AIM employees are insured by American Interstate for workers' compensation coverage and that AIM employees are paid a flat rate per diem of $50.00 and $75.00 when working away from their home job site to cover meals, lodging and incidental expenses. Ms. Jett further stated that "despite several premium audits of AIM, American Interstate has never included the flat rate per diem paid to AIM employees as part of payroll for the purposes of calculating the premium owed in the premium calculation."

21. The audit worksheet documenting that per diem was included in payroll was provided to AIM when the audit was billed on August 3, 2010.

22. Beverly McKee ("Ms. McKee"), a project analyst for Domtar Paper Company, testified by affidavit signed September 2, 2010 that she was "over tracking of

costs at Weyerhaeuser in Campti, Louisiana" and that, to the best of her knowledge, the $80.00 per diem paid by Towers to its employees outside the 50-mile radius of their home site was "to cover lodging, meals, and incidentals and was a fair estimate of the actual expenses incurred by the employee." Ms. McKee further testified that Weyerhaeuser/International Paper Company "did not consider the flat rate per diem expense as part of wages or income to the employees."

23. American Interstate first became aware that Towers paid per diem to some of its employees in November 2008, when American Interstate received payroll records in connection with a dispute regarding class codes assigned to various Towers employees during the May 3, 2007 – May 3, 2008 policy period.

See Technical Record ("T.R."), Vol. 1, pp. 151-55.

The administrative hearing on this matter was held before Administrative Law Judge ("ALJ") Joyce Grimes Safley and Assistant Commissioner for Policy Marie Murphy, sitting as Designee of the Commissioner of Commerce and Insurance, on September 19, 2011. After the conclusion of the hearing and after consideration of the record, Ms. Murphy determined that the per diem payments Towers made to its employees during the May 3, 2008 – May 3, 2009 policy period were properly included by American Interstate under the policy; that the total premium due under the policy is $281,626.00; and that the final premium audit billing issued by American Interstate in the amount of $21,694.00 is due and payable, subject to any applicable discounts and/or adjustments. She based this decision on her conclusions of law, which the Court adopts, in pertinent part, as stated below:

1. Pursuant to Tenn. Comp. R. & Regs. 1360-4-1-.02(7), the Petitioner, Towers Construction Services, LLC, 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 requires each insured to be a member of the designated rate service organization and to adhere to a uniform classification system filed by the designated rate service organization and approved by the Commissioner.

3. NCCI is the designated rate service organization for the State of Tennessee pursuant to Tenn. Code Ann. § 56-5-320.

4. Workers' compensation insurance premiums are determined in accordance with the *Basic Manual for Workers' Compensation and Employers Liability Insurance* ("*Basic Manual*") adopted by NCCI.

5. Rule 2-B-1 of the *Basic Manual* provides in pertinent part:

> RULE 2 – PREMIUM BASIS AND PAYROLL ALLOCATION
>
> B. PAYROLL
>
> For purposes of this manual, payroll means money or substitutes for money.
>
> 1. Includes:
>
> * * * *
>
> p. Expense reimbursements to employees to the extent that an employer's records do not confirm that the expense was incurred as a valid business expense.

6. Rule 2-B-2-h of the *Basic Manual* provides as follows:

> h. Expense reimbursements to employees to the extent that an employer's records confirm that an employer's records confirm that the expense was incurred as a valid business expense.

> Reimbursed expenses and flat expenses (except for hand or hand-held power tools) paid to employees may be excluded from the audit only if all three of the following conditions are met:
>
> (1) The expenses are incurred for the business of the employer
>
> (2) The amount of each employee's expense reimbursement is a fair estimate of the actual expenses incurred by the employee in the conduct of his/her work
>
> (3) The amount of each employee's expense reimbursement is a fair estimate of the actual expense incurred by the employee in the conduct of his/her work
>
> Note: When it can be verified that the employee was away from home overnight on the business of the employer, but the employer did not maintain verifiable receipts for incurred expenses, a reasonably expense allowance, limited to a maximum of $30 per day, is permitted.

7. Towers failed to show by a preponderance of the evidence that American Interstate misinterpreted or misapplied Rule 2-B-1 and Rule 2-B-2 of the *Basic Manual* by including the per diem payments of over $30.00 to Towers' employees in payroll to calculate premium under the Policy. Taken together, Rule 2-B-1 and Rule 2-B-2 are unambiguous in providing that, in the absence of verifiable receipts, a maximum of $30.00 per diem may be excluded from payroll and that any additional per diem in excess of $30.00 should be included in payroll. Rule 2-B-1-p requires inclusion of expense reimbursements "to the extent that an employer's records do not confirm that the expense was incurred as a valid business expense." Towers argues that the per diem paid to its employees was a valid business expense because the employees were "out of town"; however, Towers did not require or maintain receipts from any employees to whom per diem was paid and was not otherwise able to establish that the $1,292,318.00 it paid in per diem was a valid business expense. Towers argues that Rule 2-B-2-h details criteria

that, when met, allow exclusion of flat expense payments to employees and that the Note included in the Rule should not be interpreted as limiting the applicability of the preceding provisions of the Rule when such criteria have been met. The Note is, however, an integral part of the Rule and can only be interpreted as limiting the amount of flat expense payments to employees which can be excluded to a maximum of $30.00 per day when the employer did not maintain verifiable receipts for incurred expenses.

8. Towers failed to show by a preponderance of the evidence that American Interstate should be prevented under the doctrine of estoppel or implied waiver from recovering additional premium based on the per diem payments to Towers employees during the Policy Period. In order to establish waiver based upon a course of dealing, "it must first be shown that an accepted course of conduct or dealing had been established by the parties and, secondly, that appellant had relied on that course of conduct." *See Dacus v. Weaver*, 1988 WL 138918, at *2 (Tenn. Ct. App. Dec. 28, 1988). Towers contends that its disclosure to American Interstate of payments, including per diem, to employees during the May 3, 2007 – May 3, 2008 policy period and the fact that American Interstate did not include per diem in determining premium during such period constitutes a "course of dealing" that resulted in a change in Towers' position since, as Towers argues, it could have obtained receipts from employees for expenses if it had been "instructed" to do so. The facts in this matter do not, however, support a finding that American Interstate's failure to include per diem in payroll in determining premium for one previous policy period should be considered a sufficient pattern or course of conduct, or a clear, unequivocal, and decisive act on its part to waive the terms of the Policy or applicability of the *Basic Manual* warranting a prejudicial change in Towers' position,

particularly in view of the fact that at least some of the payroll records provided by Towers to American Interstate during the previous policy period did not show per diem payments to Towers employees and since, as of the date of the hearing, Towers was still not maintaining verifiable receipts from its employees of their business expenses. *See* T.R., Vol. 1, pp. 156-59.

On March 1, 2012, Towers sought judicial review of the Final Order pursuant to Tenn. Code Ann. § 4-5-322. This case was heard before the Court on August 22, 2012.

II. Standard of Review

In reviewing the decision of an administrative agency or commission, this Court does not sit as a trial court and does not consider the record *de novo*. Rather, review of this case is proper under the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322. Accordingly, judicial review of the commission's decision is confined to the administrative record, and the commission's findings are entitled to considerable deference. *See Metropolitan Gov't of Nashville v. Shacklett*, 554 S.W.2d 601 (Tenn. 1977). The Court may not substitute its judgment for that of the agency, even when the evidence could support a different result. *See Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988).

Pursuant to Tenn. Code Ann. § 4-5-322(h), this Court may reverse or modify the agency's decision only if the petitioner's rights have been prejudiced because the decision is:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in light of the entire record.

Id. No commission's decision in a contested case shall be reversed, remanded or modified unless for errors which effect the merits of the decision. *See* Tenn. Code Ann. § 4-5-322(i).

In determining whether the commission's decision is based on substantial and material evidence, this Court must determine if the record of the proceedings contains "such relevant evidence as a reasonable mind might accept to support a rational conclusion." *Clay County Manor v. State Dep't of Health & Env't*, 849 S.W.2d 755, 759 (Tenn. 1993). The Court may not reweigh the evidence, and the commission's decision need not be supported by a preponderance of the evidence. *See Humana of Tenn. v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn. 1977); *Street v. State Bd. of Equalization*, 812 S.W.2d 583, 585-86 (Tenn. Ct. App. 1990). A commission's decision is arbitrary and capricious if it is not based on any course of reasoning or exercise of judgment, or if there is a clear error in judgment.[2] *See* Tenn. Code Ann. § 4-5-322(h)(4); *Jackson Mobilephone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110-11 (Tenn. Ct. App. 1993).

III. Discussion

On appeal, Towers posits the following arguments: 1) The $80.00 flat rate per diem paid by Towers should be excluded from the premium calculation; 2) The Note is

[2] "Agency decisions not supported by substantial and material evidence are arbitrary and capricious. . . . [A]gency decisions with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment." *Jackson Mobilephone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993). An "arbitrary" decision is one not based upon any course of reasoning or exercise of judgment or is one that disregards "the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Id.* at 111. Evidence is sufficient "if it furnishes a reasonably sound factual basis for the decision being reviewed." *Id.*

ambiguous and contradictory; and 3) American Interstate previously excluded the per diem from the premium calculation.

A. The $80.00 Per Diem and the Note

The language of Rule 2-B-2-h states that a flat expense may be excluded from payroll if "all three" conditions are met. The three conditions are then listed. After the conditions are listed, there is a Note that states that if an employer does not maintain verifiable receipts for incurred expenses, then a reasonable expense allowance is limited to $30.00 per day. "An insurance policy and its endorsements are to be read as a whole, all provisions of the policy being construed together, rejecting no part of the policy which may, by a reasonable construction, be saved." *Garner v. American Home Assurance Co.*, 460 S.W.2d 358, 361 (Tenn. Ct. App. 1969) (citations omitted).

Reading the conditions and the Note together, it is clear that, under the Rule, reimbursed expenses **and** flat expense allowances can be excluded from payroll if 1) the expenses are incurred for the business of the employer, 2) the amount of each employee's expense payments or allowances are shown separately in the employer's records, and 3) the amount of each employee's expense reimbursement is a fair estimate of the actual expenses incurred by the employee in the conduct of his/her work; **but**, when it can be verified that the employee was away from home overnight on the employer's business but the employer did not maintain verifiable receipts for incurred expenses, the reasonable expense allowance is capped at $30.00 per day. Stated another way, even if Towers met all three conditions under the Rule, the only way it could have excluded the full $80.00 per diem was to maintain verifiable receipts. Towers' suggestion of interpreting the Rule and the Note as applying only to those expenses that are reimbursed

without receipts, not a flat rate per diem, is too narrow of an interpretation. The Rule is clear that both reimbursed expenses and flat expense allowances are subject to the $30.00 cap in the absence of verifiable receipts.

The Court finds that the Note is not ambiguous or contradictory and further finds that the Commissioner's Designee did not err in finding that American Interstate correctly included the remaining per diem over the $30.00 cap in the payroll that formed the basis of the premium. The Final Order is affirmed on these grounds.

B. The Previous Premium

Towers argues that, because American Interstate did not include per diem payments over $30.00 as part of the prior premium calculation, it is precluded from doing so now. Further, Towers argues that American Interstate has not included per diem in the premium calculation for other policy holders. These arguments are without merit.

Beverly Gott, Audit Services Manager for American Interstate, testified that insureds were asked to report their gross payroll, which was expected to include bonuses and per diems. *See* T.R., Vol. 3, pp. 73-74. Towers had a year-end audit of its 2007-2008 policy period. During that audit, American Interstate received two different payrolls. The first set came on November 7, 2008, and the second came on November 10, 2008. *See* T.R., Vol. 3, pp. 75, 76. The first set did not reflect a line item for per diem; thus, American Interstate did not know Towers paid per diem to its employees. *See* T.R., Vol. 3, p. 75. The first set balanced to American Interstate's auditors' figures that were audited on site at Towers. *See id.* The second set did not. The second set, which reflected per diem, was approximately $500,000 lower. *See id.* at 76. Because American Interstate's physical audit and the first set of payroll records balanced,

American Interstate used the first set of records provided to calculate premiums. *See id.* Furthermore, per diem was not a dispute in the end-year 2007-2008 audit. "[T]he first time that we even knew that per diem was even paid was during that second set of records. So basically, we couldn't audit what we didn't know existed." T.R., Vol. 3, p. 76.

As stated previously, in order to establish waiver based upon a course of dealing, "it must first be shown that an accepted course of conduct or dealing had been established by the parties and, secondly, that appellant had relied on that course of conduct." *See Dacus v. Weaver*, 1988 WL 138918, at *2 (Tenn. Ct. App. Dec. 28, 1988). A single prior audit does not constitute a course of conduct, especially when American Interstate was unaware per diem was even paid until November 2008 and where the payroll records that included per diem did not balance to the site audit. *See Remco Equip. Sales, Inc. v. Manz*, 952 S.W.2d 437, 439 (Tenn. Ct. App. 1997). Because Towers cannot show that an accepted course of dealing had been established, it naturally follows that it cannot show reliance upon said course of dealing.

In arguing that American Interstate has not included per diem in the premium calculation for other policy holders, Towers is specifically referring to American Industrial Maintenance. Teresa Jett, Office Manager for AIM, stated in her Affidavit that AIM pays a per diem of $50.00 to $75.00 to its employees; that AIM does not retain receipts; and that, despite several premium audits, American Interstate has never included the flat rate per diem paid to AIM employees as part of payroll for purposes of calculating premium owed. *See* Jett Affidavit, T.R., Vol. 1, pp. 112-13. However, as shown through the testimony of Ms. Gott, American Interstate did include per diem over

$30.00 in payroll for purposes of calculating AIM's premium, and AIM paid on that difference.[3] *See* T.R., Vol. 4, pp. 110-11. Accordingly, these arguments must fail.

IV. Conclusion

For the foregoing reasons, the Court finds that the substantial and material evidence in the record supports the January 3, 2012 Final Order entered by the Commissioner of the Department of Commerce and Insurance, declaring that American Interstate Insurance Company appropriately included per diem in payroll and ordering Towers Construction Services, LLC to pay American Interstate past due premiums in the amount of $21,694.00. Accordingly, the Court hereby AFFIRMS the Final Order. Costs of this cause are taxed to Petitioner, Towers Construction Services, LLC, for which execution may issue if necessary.

IT IS SO ORDERED.

RUSSELL T. PERKINS, CHANCELLOR

cc: William A. Lewis, Esq.
Elizabeth B. McCostlin, Esq.
Michael L. Haynie, Esq.
Sarah Hiestand, Esq.

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

Deputy Clerk and Master
Chancery Court

5/3/13
Date

[3] AIM's gross per diem paid to its employees was $24,475. Per diem excluded from payroll (i.e., pursuant to the $30 cap) was $14,070. Thus, AIM paid a premium on the per diem included in payroll of $10,405 (i.e., $24,475 - $14,070 = $10,405). *See* T.R., Vol 4, pp. 110-11.