

RECEIVED

BEFORE THE COMMISSIONER OF THE  
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE PH 1:29  
FOR THE STATE OF TENNESSEE

SECRETARY OF STATE

IN THE MATTER OF:

AMERICAN TRANSPORTATION  
COMPANY

Doc. No.: 12.28-122453A  
WC Appeal - Insurance

and

COMPANION PROPERTY & CASUALTY  
GROUP

FINAL ORDER

This matter was heard on September 22, 2014 before the Honorable Kim Summers, 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, American Transportation Company ("ATC"), was represented by Attorney Robert A. Crawford. The Respondent, Companion Property & Casualty Group ("Companion"), was represented by Attorneys Richard Clark, Jr. and Brooke Baird.

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 Companion is owed additional premium based on the potential liability of ATC related to potential legal actions involving the workers' compensation for work performed by truck drivers engaged by ATC. ATC asserts that it should not owe additional premium because these truck drivers were subcontractors who were responsible for self-coverage or obtaining their own workers' compensation insurance. ATC believes that it obtained coverage under the assigned risk plan only for office employees and that their contracted truck drivers were not intended to be a part of the coverage. Companion asserts that it bore a risk of loss in relation to the contracted truck drivers since no evidence was presented showing that the drivers were covered under another workers' compensation policy. Because it bore this risk of loss, Companion asserts that it is owed additional premium of \$49,326 based on the payroll ATC paid the contracted drivers plus prejudgment interest.

Upon consideration of the record, it is determined that Companion did bear additional risk over the workers engaged by ATC and, accordingly, ATC owes additional premium to Companion in the amount of forty nine thousand three hundred and twenty six dollars (\$49,326). Furthermore, for the reasons stated below, the Commissioner lacks the authority to assess prejudgment interest in this matter and therefore the motion to assess prejudgment interest is denied.

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

### **FINDINGS OF FACT**

1. American Transportation Company is a Tennessee corporation which provides drive away transportation services. Clients engage ATC to provide qualified drivers who can

operate client-owned trucks. ATC maintains a small office staff of employees and enters into contracts with prospective truck drivers to service ATC's clients.

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. Companion Property & Casualty Company is an insurance company licensed to sell workers' compensation insurance coverage in Tennessee and was at all relevant times the underwriting carrier for ATC's workers' compensation insurance through the TWCIP.

4. ATC obtained workers' compensation insurance from Companion for the policy year August 19, 2011 to August 19, 2012. The policy was assigned to Companion by the TWCIP.

5. Truck drivers retained by ATC enter into a contract whereby they agree, at mutually agreeable times, to perform drive away services for ATC's clients. Drivers are compensated at a mutually agreed upon rate for each job. From this job rate, drivers are expected to cover all fees and expenses associated with the job, including costs of fuel, tolls, and any assistants, helpers, or co-drivers.

6. ATC does not require contracted drivers to obtain workers' compensation insurance for themselves or any assistants. During the relevant policy period ATC did not obtain any proof of coverage from the contracted drivers.

7. When ATC obtained workers' compensation coverage from the TWCIP, it stated on the application that no work would be sublet without certificates of insurance. *See Exhibit 7, p. 2, line 7.*

8. This policy contained the following provisions, in pertinent part:

### **C. Remuneration**

Premium of 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 a 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.

### **Premium Payments**

You will pay all premium when due. You will pay the premium even if part or all of a workers' compensation law is not valid.

### **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. . .

### **Records**

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

### **Audit**

You will let us examine and audit all of 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.

(Exhibit 10, p. 25) (emphasis added).

9. At the conclusion of the policy year, Companion performed a premium audit on ATC.

10. Companion was unable to obtain from ATC accurate payroll records or actual payments to drivers. Based on the records it was able to obtain, Companion determined that \$1,611,021 was paid out to 132 ATC drivers and initially calculated that it was owed \$147,794 in initial premium.

11. Since the amount paid out to ATC drivers included compensation for both wages and expenses such as fuel, Companion revised its premium calculation to only treat one third of the amount paid out to drivers as payroll. Based on the revised calculation, Companion determined it was owed \$49,326 in additional premium.

12. While ATC does contest that it owes any premium on its contracted drivers, it has not contested Companion's calculation of the amount of additional premium owed should ATC be found liable for premiums on its drivers. Specifically, ATC did not dispute Companion's decision to treat one third of the total amount paid out to drivers as payroll subject to premium.

#### **CONCLUSIONS OF LAW**

1. In accordance with Tenn. Comp. R. & R. 1360-04-01-.02(3) and (7), the Petitioner, American Transportation Company 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. The issue in this case is not whether ATC's contracted drivers meet the definition of an independent contractor under Tenn. Code Ann. § 50-6-102. Instead, the singular issue is whether there was a risk of loss emanating from the individuals hired by ATC to operate their client's trucks.

3. The Tennessee Court of Appeals has stated that, regardless of independent contractor status there must be an inquiry in a premium rate dispute as to the terms of the workers' compensation policy based on the exposure of the insurer to a risk of defending a workers' compensation lawsuit filed by a worker, even if only to litigate the worker's status.

In *Continental Casualty Co. v. Theraco, Inc.*, 2014 WL 172382 (Tenn. Ct. App. Jan. 14, 2014), the Court of Appeals considered a case where the insured's policy contained a clause substantially similar to the policy at issue in this case. Both policies specified that premiums would be due on any person engaged in work that could make the insurer liable. The Court of Appeals determined that it was only necessary to determine whether the insurers would have a duty to defend a lawsuit at its expense, even if only to determine whether the worker was an employee or an independent contractor. *Id.* at \*14. The Court determined that, regardless of the workers' compensation classification as independent contractors, the insurance companies assumed the risk that they would have to defend the employers in the event workers' compensation coverage is contested. The policies do not require that potential lawsuits have a reasonable chance of success. *Id.*

3. By failing to ensure that its drivers were covered under a workers' compensation policy, ATC placed Companion at a risk of loss for ATC's drivers. Accordingly, Companion is owed premium for assuming that risk of loss. Companion would have been responsible for defending any workers' compensation claims brought against ATC by any of ATC's drivers or

their next of kin, whether or not the claims had merit or Companion prevailed in establishing that the drivers were independent contractors or subcontractors.

4. ATC bears the burden of proof to show that the final audited premium should be overturned. By failing to provide documentation that its drivers were covered by workers' compensation insurance, ATC has failed to meet its burden of proof.

5. Companion estimated that one third of the total amount paid out to drivers during the policy year should be treated as payroll for the purposes of premium calculation. ATC did not dispute this premium estimate methodology. In the absence of such a dispute, Companion's estimate on the specific amount of premium owed under the policy must be accepted.

6. In its pre-hearing brief, Companion asks that the Commissioner assess pre-judgment interest in the amount of 10% percent. Companion cited no authority for the Commissioner to assess this interest in its brief. In Companion's proposed findings of fact and conclusions of law, there are cited a number of unpublished cases which, Companion claims, support the Commissioner's authority to award pre-judgment interest in retrospective rating cases. *CNA v. King*, 2006 WL 2792159 (Tenn. Ct. App. 2006); *American Zurich Ins. Co. v. MVT Services, Inc.*, 2012 WL 3064650 (Tenn. Ct. App. 2012). *Hartford Underwriters Ins. Co v. Penney*, 2010 WL 2432058 (Tenn. Ct. App. 2010). Again, Companion cites no statutory authority in either its proposed findings of fact and conclusions of law or pre-hearing brief to support its argument that the Commissioner has the authority to award pre-judgment interest.

The above cited cases are inapposite. Each case involves contractual rate disputes that were adjudicated on the merits in a state trial court. None of these cases were appeals taken from a Uniform Administrative Procedures Act ("UAPA") final order. Each case above relies upon Tenn. Code Ann. § 47-14-123 as the authority to award prejudgment interest, which does not extend to contested case hearings before the Commissioner.

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 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 authority 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.

As this proceeding is 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**:

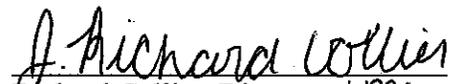
1. American Transportation Company shall pay additional premium to Companion Property & Casualty Group in the amount of forty nine thousand three hundred and twenty six dollars (\$49,326.00) for the August 19, 2011—August 19, 2012 policy period within sixty (60) days of this Order.

2. The motion for prejudgment interest is DENIED.

3. The costs of this matter shall be taxed against the Petitioner, American Transportation Company.

  
Maliaka Bass  
Commissioner's Designee

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 10<sup>th</sup> day of December, 2014.

  
Richard Collier, Director LMC  
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-.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.

**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 10<sup>th</sup> day of December, 2014:

Richard R. Clark, Jr.  
Brooke L. Baird  
200 Richard Jones Road, Suite 260  
Nashville, TN 37215

Robert A. Crawford  
Kramer Rayson, LLP  
PO BOX 629  
Knoxville, TN 37901-0629



---

Michael R. Shinnick,  
Workers' Compensation Manager