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

IN THE MATTER OF:	)	
	)	
TOWERS CONSTRUCTION SERVICES, LLC	)	**Docket No. 12.28-106361A**
	)	**WC Appeal - Insurance**
and	)	
	)	
AMERICAN INTERSTATE INSURANCE COMPANY	)	

FINAL ORDER

This matter was heard on September 19, 2011, in Nashville, Tennessee before the Honorable Joyce Grimes Safley, Administrative Judge appointed by the Secretary of State, with Marie Murphy, Assistant Commissioner for Policy, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner's Designee, Ms. Murphy makes the final determination as to Findings of Facts and Conclusions of Law in this matter. The Petitioner, Towers Construction Services, LLC ("Towers"), was represented by Attorney William A. Lewis. The Respondent, American Interstate Insurance Company ("American Interstate"), an operating subsidiary of Amerisafe, Inc., was represented by Attorney Michael L. Haynie.

JURISDICTION

The Commissioner of Commerce and Insurance (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 manner 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.

ISSUES

The issues raised by Petitioner's December 4, 2009 appeal are: (a) whether American Interstate correctly applied the National Council of Compensation Insurance *Basic Manual for Workers' Compensation and Employers Liability Insurance* ("*Basic Manual*") by including the amount of per diem payments which exceeded $30.00 per day made by Towers to its employees in payroll for purposes of calculating the premium due for workers' compensation insurance coverage for the period May 3, 2008 through May 3, 2009 (the "Policy Period"); and (b) whether American Interstate should be prevented from including per diem in payroll in the absence of verifiable receipts for business expenses for purpose of calculating premium for such coverage during the Policy Period because it did not require Towers to maintain receipts for business expenses in order to exclude per diem payments in calculating premium for the previous, May 3, 2007—May 3, 2008, policy period.

After consideration of all evidence presented in this matter, it is determined that American Interstate: (a) properly included the amount of per diem payments to Towers employees in excess of $30.00 per day in payroll in calculating premium for the Policy Period in the absence of verifiable receipts for business expenses; and (b) American Interstate should not be barred from including the amount of per diem payments to Towers employees in payroll for determining premium due for the Policy Period because it failed to do so with regard to a previous policy period.

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

FINDINGS OF FACT

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

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. 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 premium 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, 2077--May 3, 2008 policy period.

13. On August 7, 2009, Towers' insurance agent, Andrew Darlington, sent a letter to 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. Longancre 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 of NCCI's stating that:

> ... Towers did not provide documents confirm that the amounts paid to employees are for valid business expense, 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.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and 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. The National Council on Compensation Insurance ("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 the expense was incurred as a valid business expense.

> Reimbursed expenses and flat expense allowances (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 reasonable 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 were 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 valid business expenses. 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 (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 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 the *Basic Manual* warranting a prejudicial change in Tower's 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.

9. Tenn. Comp. R. and Regs. 0780-1-82-10(2) (g) provides that "[o]rders issued under . . . this Rule "shall assign the costs of the appeal, in the commissioner's discretion, to the non-prevailing party."

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

1. American Interstate Insurance Company properly included the per diem payments made by Towers Construction Services, LLC to its employees during the May 3, 2008—May 3, 2009 Policy Period under the Policy.

2. The total premium due under the Policy is $281,626.00, the unpaid balance of which is $21,694.00.

3. The final premium audit billing issued by American Interstate Insurance Company in the amount of $21,694.00 is due and payable, subject to any applicable discounts and/or adjustments; and

4. Costs of this proceeding are assessed against the Petitioner, Towers Construction Services, LLC.

This Final Order is entered and effective this the 3rd day of January, 2012.

Marie Murphy

Marie Murphy
Assistant Commissioner for Policy

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 3rd, day of January, 2012.

Thomas G. Stovall, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

A copy of the within and foregoing document has been served upon,

Terry L. Hill
Michael L. Haynie
Manier & Herod
2200 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219-2494

William Lewis
Baker, Donelson, Bearman, Caldwell & Berkowitz
Baker Donelson Center, Suite 800
Nashville, Tennessee 37201

Michael R. Shinnick
Workers' Compensation Manager
Tennessee Department of Commerce and Insurance
500 James Robertson Parkway, Fourth Floor
Nashville, TN 37243

By depositing same into the United States Mail enclosed in an envelope with adequate postage affixed thereon.

This the 3rd day of January, 2012.

Jacquie Fortenberry

Jacquie Fortenberry