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JUL 16 2015
Department of Insurance
State of Idaho

BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

In the Matter of:)	
)	Docket No. 18-2939-14
)	
BOISE CITY TAXI, INC.'s LIBERTY)	FINDINGS OF FACT, CONCLUSIONS OF
MUTUAL INSURANCE POLICY)	LAW AND PRELIMINARY ORDER
NO. WC5-39S-322727-013)	
)	
NCCI Case No. 25724,)	
)	
)	

This matter came on for hearing on March 3, 2015 and March 5, 2015, before the undersigned Hearing Officer. Boise City Taxi appeared through its representatives and its attorney of record, Bradley Richardson. Liberty Mutual Insurance appeared through its representatives and its attorney, Kent Day. Brandon Karpen, Deputy Attorney General for the Department of Insurance, sat in on the hearing, but the Department of Insurance expressed no position on the issues to be heard.

Following the presentation of testimony and evidence, the parties agreed on a briefing schedule. The final post hearing Brief was received June 15, 2015. In this decision, Boise City Taxi will be referred to as BCT and Liberty Mutual Insurance will be referred to as Liberty Mutual.

ISSUE PRESENTED ON APPEAL

The issue presented by this case is whether the taxi cab drivers who lease taxi cabs from BCT are employees or independent contractors for purposes of workers compensation and whether BCT must provide workers compensation insurance to cover those taxi cab drivers.

STATEMENT OF FACTS

Boise City Taxi's Operations

There is little factual dispute regarding how BCT operates with respect to the taxi cab drivers BCT leases taxis to.

BCT has been in operation since 1992 for approximately twenty-three (23) years. BCT has approximately 15-17 employees, consisting of clerical staff and mechanics. There is no dispute these workers are employees of BCT.

BCT's primary business is to maintain and lease taxis to drivers. BCT owns approximately 30 cabs which it leases to 80 to 85 drivers.

BCT and the taxi cab drivers do not have a written contract detailing the relationship between BCT and the lessee-drivers. However, BCT maintains Lease and Dispatch Service Fee Sheets, which were admitted as Exhibit 47. These lease sheets show the amounts drivers owe BCT for their leased shifts.

The undisputed evidence establishes drivers lease the taxis on a weekly basis. They pay a set rate depending on the shift the driver chooses. The drivers decide what shifts they want to lease taxis for. Drivers agree to lease cabs for shifts they select and the drivers must pay for those shifts even if they are sick or otherwise unable to drive during a leased shift. Most of BCT's fleet is parked at drivers' residences around the area. BCT operates a dispatch service for the independent drivers and charges the drivers a portion of the lease fee for the dispatch service. Drivers can choose whether to accept or reject a dispatch.

BCT licenses and maintains their taxis in compliance with the Boise City Code; however, drivers are responsible for all individual licensing requirements. Drivers pay their own personal licensing fees, including background checks, obtaining driving records, and securing a Department of Transportation physical. Drivers pay for their own gas and must return vehicles filled. Drivers must pay for their own pass to pick up passengers at the airport. Drivers also pay a \$500 initial deposit to cover a portion of any damage they cause the cabs. Finally, drivers are responsible for any citations they receive while driving the cabs.

The drivers handle and collect their fares. BCT has no control or even knowledge of the amount of money drivers earn. Although BCT is required by the City of Boise to have credit card swipers in all cabs, drivers are entitled to use their own swipers to receive funds directly. Drivers are responsible for paying their own taxes and obtaining their own health insurance. There is no payroll or remuneration of any kind that BCT pays to the drivers. In fact, the only money transferred is from the driver to BCT.

The City of Boise through the Boise City Code regulates all licensed taxi cab drivers and cab companies, providing the most significant control over taxi drivers. Drivers must follow a dress code established by the City. The City also sets the maximum rates and fares that may be charged by all taxi cab drivers. Drivers must maintain a daily record of all passengers transported within the past six (6) months. B.C.C. 5-24-13. Drivers are required to take the shortest route to a passenger's destination. B.C.C. 5-24-17(H)(6). The City Code sets forth numerous other provisions regulating the conduct all drivers operating in the City. *See e.g.* B.C.C. 5-24-17.

BCT does not exercise any control over the time, method, or manner in which drivers use taxicabs during their leased time. Drivers may operate in any area. Drivers can stop working at any time during a shift. Drivers may use the cabs for personal use during leased shifts.

Drivers set their own schedules. Drivers are free to change their own lease schedules from one week to the next, and are under no obligation to work any specific shift. The lease sheets set forth times for which drivers have agreed to pay, and there is no obligation to perform any services during that time.

Boise City Taxi's Disputed Worker's Compensation Policy with Liberty Mutual

BCT was unable to obtain worker's compensation coverage for its employees in the voluntary market due to cancellation of its prior SIF policy for non-payment and BCT sought coverage through its agent, Interstate Truckers, in the assigned-risk pool. The policy was assigned to Liberty Mutual by NCCI, the National Council on Compensation Insurance.

Liberty Mutual issued a policy to BCT in October, 2013. The initial estimated annual premium for BCT's policy, covering garage and clerical employees, was \$10,468. This amount included a class premium of \$3,846.00 which was calculated from the estimated payroll for BCT's garage and clerical staff employees. With assigned-risk surcharges and modifiers, this class premium nearly tripled to an estimated annual premium cost of \$10,468. Specifically, the policy provided that the premium would be calculated based on "payroll and other remuneration... for the services of: 1.) all officers or employees engaged in work covered by the policy; and 2.) all other persons engaged in work that could make us liable under part 1 (Worker's Compensation Insurance) of this Policy." Ex. 2, *Part 5- Premium* (22nd page). As the undisputed evidence indicates BCT does not pay or provide any payroll or remuneration for the drivers. Rather, the drivers pay BCT.

Rebecca Conrad with Liberty Mutual conducted a "preliminary" premium audit around December 4, 2013. Ms. Conrad's audit expressly stated the drivers are "independent," and that BCT "does not have any employees" engaged in driving the cars. In spite of these statements, Liberty Mutual included the independent drivers on BCT's worker's compensation policy citing only Scope 7370 of the NCCI Scopes Manual. This resulted in the initial class premium going from \$3,846.00

to nearly \$83,884.00. With assigned risk surcharges and modifiers, the class premium nearly tripled, and caused the estimated premium for the entire policy to go from \$10,468.00 to \$226,913.00.

The Liberty Mutual Detail Contract Report was admitted as Exhibit 9. Page 4 states:

BOISE CITY TAXI HAS ABOUT 32 VEHICLES. TAXI UNITS ARE LEASED FOR 12 HOUR SHIFTS. THE DRIVERS PAY BCT IN ORDER TO USE THE CAB. THEY REPLACE GAS USED. THE TAXI DRIVERS ARE NOT EMPLOYEES. FOR PAST 10 YEARS OR SO BCT DID COVER THESE DRIVERS.

Exhibit 27, Liberty Mutual Insurance Residual Market Evaluation Report and Underwriting Notice, further notes that the taxi drivers are not employees, but are independent cab drivers. Ms. Conrad's testified the drivers were independent contractors during the NCCI dispute proceeding with Tim Hughes.

The evidence does establish that for several years prior to the dispute with Liberty Mutual, BCT did elect to provide coverage for these taxi cab drivers through the State Insurance Fund. It was a business decision BCT made because they choose not to challenge whether such coverage was actually required under worker's compensation laws. The fact that BCT previously provided worker's compensation coverage without challenge is irrelevant to whether they had an actual legal obligation to do so.

During this appeal, Liberty Mutual has contended that they have not actually made a final decision regarding the drivers' status. They argue that they have three years from the end date of the policy to complete a final audit. Consequently, Liberty Mutual contends they have not made a final decision. However, Liberty Mutual certainly did bill BCT for a premium which indicates that they had made a decision and, given the pendency of this case for many months, Liberty Mutual had enough information to make a decision by now.

BCT correctly asserts that there is no indication that Liberty Mutual or any of his representatives actually performed any kind of analysis to determine whether the drivers were

independent contractors and what Liberty Mutual's possible worker's compensation exposure might be. Rather, Ms. Conrad assumed that Scope 7370 authorized a premium for these drivers regardless of whether the drivers were independent contractors.

The Idaho Industrial Commission publishes a brochure generally setting forth factors to consider under the Idaho "right to control test" to analyze independent contractor status. This brochure is designed to assist businesses in determining the necessity of obtaining worker's compensation insurance.

Appeal to the NCCI and Dispute Resolution Board

NCCI is a rating organization that promulgates insurance rates, and rules for their application, for numerous states, including Idaho. Idaho law requires NCCI to set up a dispute resolution process to allow individuals to challenge the application of its rules to an insured's policy. Idaho Code §41-1622. Pursuant to this requirement, NCCI established the Idaho Worker's Compensation Appeals Board. BCT requested a hearing before that Board to challenge Liberty Mutual's inclusion of the independent contractor drivers on the worker's compensation policy pursuant to Scope 7370. The hearing was set up through Mr. Tim Hughes from the NCCI. Mr. Hughes likewise presided over, and made a written record, of the hearing.

The Board decision was issued on NCCI letterhead on April 22, 2014, and states:

Prior to the Board meeting NCCI staff advised Boise City Taxi's representative that the Board does not have authority to rule on whether the carriers correctly included the drivers. The decision to include or exclude the drivers is the carrier's responsibility as stated in Scope of Code 7370.
(Exhibit 39, p. 1.)

On Page 3 of Exhibit 39, the NCCI decision states that the Board has no authority to overturn Liberty Mutual's inclusion of the drivers or make its own determination whether the drivers are independent contractors. Instead, the Board could only determine whether the carrier correctly determined the premium for the leased cabs. The decision stated the fact that Liberty Mutual included the drivers

indicates Liberty Mutual determined the drivers represent a potential liability.

The NCCI Board assumed that Liberty Mutual properly analyzed whether drivers were employees or independent contractors pursuant to Idaho law for the purposes of determining exposure. In doing so, the NCCI Board refused to review the actual disputed issue BCT has with how Liberty Mutual applied Scope 7370 to BCT's worker's compensation insurance policy.

CONCLUSIONS OF LAW

This matter is before the Department of Insurance based upon the appeal filed by BCT of the decision of the Idaho Worker's Compensation Appeals Board issued April 22, 2014. Page 3 of that decision recites BCT's has a right to appeal without any reference to the statutory authority for the appeal hearing.

Idaho Code §41-1622 provides the statutory authority for this matter and states:

(1) Every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon payment of such reasonable charges as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate.

(2) Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject such request within thirty (30) days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or such insurer on such request may, within thirty (30) days after written notice of such action, appeal to the director, who, after a hearing held upon notice to the appellant and to such rating organization or insurer in accordance with chapter 2, title 41, Idaho Code, may affirm or reverse such action. (Emphasis added.)

Idaho Code §41-1623 also allows any person to request a hearing if they are aggrieved by any filing by insurer or rating organization. Any hearings under Idaho Code §41-1623 are also subject to Idaho Code, Title 41, Chapter 2.

An initial issue which has been raised by the parties is whether this matter will proceed as a *de novo* hearing before the Department of Insurance or shall be treated only as an appeal. BCT contends that because the NCCI Board did not address the issue of whether the taxi cab drivers were independent contractors, the matter should proceed *de novo* before the Department of Insurance. Liberty Mutual contends that the Department of Insurance has no authority to determine whether the taxi cab drivers are independent contractors or employees. There appear to be no specific rules on this issue other than a general reference to the procedural requirements of the Administrative Procedure Act and APA Rules of Procedures.

Idaho Code §§41-1622 and 41-1623 both state that hearings before the Director of the Department of Insurance shall proceed "in accordance with chapter 2, title 41, Idaho Code." Idaho Code §14-231 specifically provides that the Idaho Administrative Procedure Act, Idaho Code, Title 67, Chapter 52 "shall apply as to hearings and as to all appeals." Idaho Code §41-240 deals with Orders following hearing and clearly contemplates the receipt of evidence. Idaho Code §41-240(3) states: "The order shall contain a concise statement of the facts as found by the director, and of his conclusions therefrom, and the matters required by Section 41-212, Idaho Code." The Hearing Officer concludes that this matter should proceed as a *de novo* hearing and based upon the applicable statutes, the Director of the Department of Insurance has authority to issue findings of fact and conclusions of law.

In this case, NCCI is the rating organization for worker's compensation insurance offered by Liberty Mutual. Liberty Mutual determined that BCT was required to pay premiums for worker's compensation insurance for all taxis which it leases to independent taxi drivers. BCT requested a hearing before the rating organization. That hearing was conducted on April 9, 2014. The Case Summary & Decision issued by NCCI is included in the record as Exhibit 39. The Case Summary & Decision referred to disputes regarding both the Idaho State Insurance Fund Policy and the Liberty

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Mutual Policy. However, no further review or appeal was taken related to the Idaho State Insurance Fund. Consequently, this case is applicable only to the Liberty Mutual Policy.

In that decision, the Idaho Worker's Compensation Appeals Board stated it did not have authority to rule on whether Liberty Mutual correctly included the drivers in the worker's compensation coverage and stated: "The decision to include or exclude the drivers is the carrier's responsibility as stated in the Scope of Code 7370." The NCCI Case Summary & Decision noted that the only issue which NCCI could address is whether the carrier correctly determined the payroll-premium for the drivers in accordance with Scope of Code 7370. The Board Decision states as follows:

Executive Session: The following is a summary of the Board's discussion;

- The Board has no authority to overturn Liberty Mutual's inclusion of the drivers or to make its own determination whether the drivers are independent contractors.
- Workers deemed to be employees cannot waive their right to worker's compensation insurance.
- The issue within the Board's authority is whether the carrier correctly determined the premium for the leased cabs. Boise City Taxi did not argue this issue during the meeting rather, the issue argued by Boise City Taxi is whether Liberty Mutual conducted an analysis of the employer/employee relationship when determining to charge premium for the drivers. The fact that Liberty Mutual included the drivers indicates they considered the relationship between the drivers and their policy holder and the drivers represent a potential liability to the policy. After discussion, a motion was made seconded and duly passed and it was:

RESOLVED That Liberty Mutual correctly determined the premium basis for Boise City Taxi as it concerns cabs leased to others.

Consequently, no decision was made by the Board on whether Liberty Mutual correctly included the taxi drivers on BCT's worker's compensation insurance policy.

With respect to workers compensation insurance, the Idaho Insurance Code includes an entire chapter on worker's compensation rates found at Idaho Code, Title 41, Chapter 16. Idaho Code §41-1601(1) states that the chapter applies to insurance provided to insure "the obligations of employers

under worker's compensation laws." That statute refers to the definition of worker's compensation insurance found in Idaho Code §41-506(1)(d) which states:

Workmens[workers] compensation. Insurance of the obligations accepted by, imposed upon, or assumed by employers under law for death, disablement, or injury of **employees**. (Emphasis added.)

In order to address the issue raised in this hearing, it is necessary to review the Idaho Worker's Compensation statutes. Idaho Code §72-102(13)(a) states: "Employer means any person has expressly or impliedly hired or contracted the services of another." Idaho Code §72-102(12) provides: " 'Employee' is synonymous with 'workman' and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer." Idaho Code §72-102(17) states:

"Independent contractor" means any person who renders service for a specified recompense for a specified result, under the right to control or actual control of principal as to the result of his work only and not as to the means by which such result is accomplished.

Multiple Idaho cases clearly establish that independent contractors are not covered by the worker's compensation laws and businesses are not required to provide worker's compensation insurance for independent contractors. In the case of Livingston v. Ireland Bank, 128 Idaho 66, 910 P.2d 738 (S.Ct. 1995), the Idaho Supreme Court reaffirmed the well established rule that coverage under worker's compensation laws depends on the existence of an employer-employee relationship. Determining whether an individual is an employee or an independent contractor is a factual determination. The Supreme Court further stated that the test to determine whether a worker is an independent contractor or an employee is whether the employer has the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results. The Supreme Court reaffirmed the four prong test used to determine whether a relationship with an employer is that of an employee or an independent contractor. They stated:

. . .This Court has articulated a four-pronged test to determine if the relationship between master and servant is that of employer-employee or independent contractor: 1) there must evidence of the employer's right to control the employee; 2) the method of payment, i.e., whether the employer withholds taxes; 3) whether the master or servant furnishes major items of equipment; and 4) whether either party has the right to terminate the relationship at will, or whether one is liable to the other in the event of a pre-entry termination. 128 Id. at 69.

All of these elements must be balanced. These legal requirements have also be stated in other cases. *See e.g.* reaffirmed in Wellman v. Horsley, 120 Idaho 136, 814 P.2d 36 (S.Ct. 1991); Kiele v. Steve Henderson Logging, 127 Idaho 681, 905 P.2d 82 (S.Ct. 1995); Daleiden v. Jefferson County School District, 139 Idaho 466, 880 P.3d 1067 (S.Ct. 2003).

Based upon these legal authorities, the BCT taxi cab drivers are clearly not employees of BCT and are independent contractors. BCT has no right to control the time, manner or method of how the taxi cab drivers operate. With respect to the second factor, BCT does not make any kind of payment to the taxi cab drivers. With respect to the third factor, while BCT does furnish the taxi cabs, the drivers actually pay BCT to use the cabs so BCT is not furnishing the cabs for free for the driver's use. Finally, either party has the right to terminate the relationship at will.

Consequently, the taxi drivers who lease BCT are not employees. They are clearly independent contractors.

However, the decision in this case does turn merely on whether the taxi drivers are employees or independent contractors. It is also subject to Scope 7370 of the Scopes Manual adopted by NCCI.

The "Phraseology" section of that manual states:

The entire payroll of all taxi cab drivers shall be included in computing the premium. In the absence of verifiable payroll records, the premium charge will be determined on the basis of the amount per vehicle per policy year for employee-operated vehicles shown in the State rate pages under miscellaneous values. This amount is subject to prorata adjustment only when a vehicle is owned by the insured for a portion of the policy. If the owner also leases or rents such vehicles to others, an additional premium shall be calculated on the basis of the amount per vehicle per policy year for

leased or rented vehicles shown in the State rate pages under miscellaneous values. This amount is subject to prorata adjustment only when the lease is for a portion of the policy period. These amounts are in consideration of gratuities, multiple shifts, down time, vacation time or other periods during which the vehicle is not in operation. (Exhibit 4, p. 1.)

The "Scope" section on Page 2 of Exhibit 4 further states:

It is the carrier's responsibility to determine if the taxicab drivers are **employees or independent contractors for worker's compensation purposes**. If it is determined that the taxi drivers are **employees**, and verifiable payroll records are available, the carrier should determine premium in accordance with Rule 2-A -- Premium Basis (Rule V, 1996 Edition) of the Basic Manual. If it is determined that the taxi drivers are **employees** but no verifiable payroll records are available, the carrier should determine premium in accordance with the Miscellaneous Values indicated in the state rate pages. (See, Basic Manual -- Basis of Premium for Code 7370).

In the event vehicles are being operated by **employees**, the premium is calculated based on the amount indicated in the "Employee operated vehicles" section of the Miscellaneous Values. This amount is subject to prorata adjustment only when a vehicle is owned by the insured for a portion of the policy. **If a vehicle is being leased or rented to others and as a result of this leasing or rental, the carrier incurs a worker's compensation exposure**, the premium is calculated based upon the "Leased or rented vehicles" section of the Miscellaneous Values. This amount is subject to prorata adjustment only when the lease is for a portion of the policy period. (Emphasis added.)

A clear reading of this Scope 7370 reveals that, if taxi cab drivers are not employees, the worker's compensation insurance company is entitled to require coverage and payment of a premium only if the carrier determines that it "incurs a worker's compensation exposure." The policy clearly requires an insurance company to make an actual determination that taxi cab drivers are employees or independent contractors. After that decision, if drivers are independent the insurance company must then determine whether they have a "worker's compensation exposure" for those independent contractors, in order to require the coverage or payment of a premium.

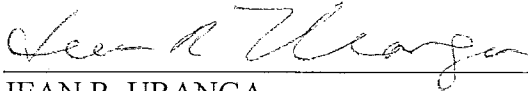
Under Idaho law, the BCT taxi cab drivers are clearly independent contractors. As independent contractors, they are not covered by worker's compensations law and BCT and its insurer have no exposure for worker's compensation claims of such drivers.

The Hearing Officer concludes the BCT taxi cab drivers are not employees covered by worker's compensation laws. Consequently, Liberty Mutual cannot require the payment of a worker's compensation premium for taxi cab drivers who lease cabs from BCT.

PRELIMINARY ORDER

Based upon the foregoing, the Hearing Officer orders that BCT not be required to pay Liberty Mutual for worker's compensation insurance premiums for the taxi cab drivers.

DATED This 15 day of July, 2015.



JEAN R. URANGA
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this 15 day of July, 2015, I served true and correct copies of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER by depositing a copy thereof in the United States mail, postage prepaid, in envelopes addressed to:

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