

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

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SECRETARY OF STATE

IN THE MATTER OF:)
)
WAYNE COUNTY GOVERNMENT)
)
and)
)
AMERICAN ZURICH INSURANCE)
COMPANY)
)
and)
)
AON RISK SERVICES CENTRAL, INC.)

**Docket No. 12.28-117710A
WC Appeal - Insurance**

FINAL ORDER

This matter was heard on December 11, 2012, in Nashville, Tennessee before the Honorable Lynn England, Administrative Judge appointed by the Secretary of State, and Chlora Lindley-Myers, Designee of the Commissioner of Commerce and Insurance. As Commissioner's Designee, Ms. Lindley-Myers makes the final determination as to Findings of Fact and Conclusions of Law in this matter. The Petitioner, Wayne County, Tennessee ("Wayne County"), was represented by Attorney Jane Jennings. Respondent Aon Risk Services Central, Inc. ("Aon") was represented by Attorneys Waverley Crenshaw, Jr. and Stephanie A. Roth. Respondent American Zurich Insurance Company ("Zurich") was represented by Attorney Ben M. Rose.

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 appeal are: (a) whether Zurich properly applied an experience modification factor of 1.34 to the workers' compensation policy issued to Wayne County through the Tennessee Workers' Compensation Insurance Plan ("TWCIP") for the July 1, 2011 through July 1, 2012 policy period after the effective date of the coverage; and (b) whether, based on application of such experience modification factor, Wayne County was properly assessed a premium surcharge of eighty-eight thousand five hundred sixty-six dollars (\$88,566.00).

After consideration of all evidence presented in this matter, it is determined that: (a) the decision by Zurich to apply an experience rating rate of 1.34 to the Wayne County policy was proper; and (b) Wayne County owes additional premium in the amount of eighty-eight thousand five hundred sixty-six dollars (\$88,566.00) based on application of such factor.

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

FINDINGS OF FACT

1. Subject to exceptions which are not applicable in this matter, Tennessee employers are required to obtain workers' compensation insurance coverage in accordance with Tenn. Code Ann. § 50-6-103.

2. The Tennessee Workers' Compensation Insurance Plan ("TWCIP") is a statutory workers' compensation insurance plan for employers who are unable to obtain coverage through the voluntary market, the market of "last resort" for workers' compensation insurance in Tennessee.

3. Aon Risk Services Central, Inc. ("Aon") administers the TWCIP and is responsible for review and, upon approval, assigning each application for workers' compensation insurance coverage through the TWCIP to an insurer to begin the underwriting process.

4. Wayne County, Tennessee is a local governmental entity which had obtained its workers' coverage during previous fiscal years through the Local Government Workers' Compensation Fund, a self-insured pool.

5. Zurich holds a certificate of authority to sell workers' compensation coverage in Tennessee and was at all times relevant the workers' compensation insurer of Wayne County through the TWCIP.

6. Wayne County submitted its application for workers' compensation insurance coverage through the TWCIP on June 30, 2011.

7. Aon, which assigns applications for workers' compensation coverage through the TWCIP to insurance carriers on a random basis, assigned Wayne County's application to Zurich.

8. As the Wayne County application was for a new policy, Aon also submitted it to Travelers Insurance Company ("Travelers") which contracts with Zurich to conduct underwriting of applications for coverage through the TWCIP.

9. On July 26, 2011, Zurich issued Workers Compensation and Employers Liability Policy Number 6ZZUB-4728P32-7-11 (the "Policy") to Wayne County for the July 1, 2011 - July 1, 2012 policy period.

10. The Information Page of the Policy indicated the "estimated annual premium" of one hundred twenty-three thousand four hundred dollars (\$123,400.00) which was paid by Wayne County.

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

GENERAL SECTION

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.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

* * * *

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.

12. The National Council on Compensation Insurance, Inc. ("NCCI") is a rate service organization within the meaning of Tenn. Code Ann. § 56-5-302(10) and is licensed as such by the Department of Commerce and Insurance (the "Department") under Tenn. Code Ann. § 56-5-310 to file forms, classifications, rates, and conduct surveys and inspections and other activities specified in the law which is applicable to both the voluntary market and the TWCIP for qualifying risk.

13. Zurich sent Supplementary Underwriting Information Requests to Wayne County dated July 25, 2011 and November 30, 2011, requesting information regarding Wayne County's loss history for the years preceding the July 1, 2011 - July 1, 2012 policy period.

14. NCCI is the designated rate service organization for Tennessee pursuant to § 56-5-320 and is responsible for collecting and analyzing premium and loss data received from insurance companies that write workers' compensation insurance in Tennessee and making loss cost filings with the Department applicable to both the voluntary market and the TWCIP. NCCI also compares an employer's actual loss data to its expected losses for qualifying risk based on pertinent classifications and industry type to determine its experience modification factor.

15. NCCI publishes the *Basic Manual for Workers' Compensation and Employers Liability Insurance* ("Basic Manual") and *Experience Rating Plan Manual for Workers Compensation and Employers Liability Insurance* ("Experience Rating Manual") filed with the Department of Commerce and Insurance applicable to coverage through the TWCIP.

16. Applicable terms and conditions of the TWCIP are outlined in the written TWCIP Plan Document, including the Supplement captioned the TWCIP Agent Guide ("Agent Guide"), which has been approved by the Department of Commerce and Insurance.

17. Section A of the Agent Guide specifies the eligibility requirements for application for coverage through the TWCIP, including declinations from at least two non-affiliated insurance companies licensed to write workers' compensation insurance in the voluntary market in Tennessee.

18. Section A of the Agent Guide requires completion of the ACORD® 130 Workers Compensation Application and ACORD® 133 Assigned Risk Supplement forms, both of which require signature by the applicant for coverage and certification by the insurance producer that all information provided on such forms is "true and accurate to the best of his/her knowledge and belief."

19. The ACORD® 130 provides that "coverage will be bound in accordance with plan rules" and that the applicant agrees "to take no action in any form to evade the application of an experience modification determined in accordance with the experience rating rules, as determined by the Plan Administrator."

20. Mandatory requirements for application for coverage in the TWCIP are specified in Section B of the Agent Guide, including, but not limited to, providing a copy of the most recent experience modification factor applicable to the proposed period of coverage.

21. Rule 2-E-2 of the *Experience Rating Manual* provides in pertinent part as follows:

Non-Affiliate Self-Insurer and Non-Affiliate Carrier Data

- a. Experience of risks insured by non-affiliate self-insurers and non-affiliate carriers may be included in an experience rating.
- b. The data must be submitted to the rating organization in an approved format (see the ERM-6 Form in Appendix). The data is subject to verification by the affiliate self-insurer or affiliate carrier submitting the data for inclusion in an experience rating.
- c. The affiliate self-insurer or affiliate carrier requesting the data inclusion must be the risk's insurer during the time for which the modification including non-affiliate data would apply.
- d. For multiple insurer risks, agreement from only one of the risk's insurers, during the time for which the modification would apply, is required.
- e. The non-affiliate self-insurer or non-affiliate carrier data will not be used to determine premium eligibility.

22. In accordance with Rule 2-E-2 of the *Experience Rating Manual*, NCCI uses the ERM-6 Form, captioned "Workers Compensation Experience Rating For Non-Affiliate Data," included in Appendix A5 of the *Experience Rating Manual* to support the calculation of an experience rating provided by a non-NCCI-affiliate self-insurer or a non-affiliate carrier ("non-affiliate(s)").

23. NCCI compares an employer's actual loss data to its expected losses based on classification and industry type to determine its experience modification factor. The experience modification factor tailors premiums based on losses; those employers who have greater than expected losses are charged additional premium.

24. Applicants to the TWCIP are required to provide five years of loss history if it is available so that the TWCIP can determine whether an experience modification factor should be applied to the premium.

25. The Wayne County Executive (also referred to as "County Mayor"), Jason Rich ("Mr. Rich"), testified that: (a) prior to July 1, 2011, Wayne County had workers' compensation insurance coverage through the Local Government Insurance Pool; (b) Wayne County received three bids in response to an invitation to bid for its workers' compensation insurance coverage, the lowest of which was submitted by Tennessee Risk Management Partners, LLC.

26. Mr. Rich further testified that he reviewed the Policy when it was received in July 2011 and understood that the premium was estimated, but was not aware of the possibility that there could be a surcharge until he received a bill for "\$88,000" for additional premium in April 2012.

27. Kim Zersen ("Ms. Zersen"), a senior account specialist for Aon, testified that all applicants to the TWCIP must provide five years' of loss history, if available, so that the TWCIP can determine whether an experience modification factor should be applied to the premium.

28. Ms. Zersen further testified that, as Plan Administrator, Aon has discretion to apply an experience modification factor retroactively to the date coverage commenced.

29. Laura Jungmichel ("Ms. Jungmichel") is an insurance producer who formed Tennessee Risk Management Partners, the insurance agency which has represented Wayne County since July 1, 2011.

30. Ms. Jungmichel acknowledged in her testimony that the Wayne County application to the TWCIP was "incomplete" in that it failed to adequately state that Wayne County had multiple years of loss history.

31. Assistant Operations Manager for Travelers Insurance Company, Sue Flury ("Ms. Flury"), testified that, as a direct assignment carrier, Travelers verifies the completeness and

accuracy of information submitted on or with an application to the TWCIP and attempts to assess the amount of exposure, nature of the business and claims history for each account.

32. Ms. Flury further testified that Travelers typically requests a loss run history in order to calculate the premium based on the risk and, in the case of an entity that has not been insured by a NCCI member (and, therefore, not able to provide current loss data), the employer is provided the ERM-6 form to capture the loss history and forward such information to NCCI in order to determine the proper experience modification factor.

33. Ms. Flury testified that Zurich requested loss information from Wayne County on July 25, 2011 which would enable NCCI to determine and assign an experience modification factor for the Wayne County Policy based its loss history and that the ERM-6 form was not returned until December 14, 2011. Such form was, however, incomplete, in that it failed to include information regarding the injury type for each claim made against Wayne County and whether that claim was open or closed.

34. Wayne County submitted a completed ERM-6 form to Zurich in January 2012; however, NCCI returned such form to Wayne County because it had not been signed.

35. Ms. Flury testified that Travelers received a completed and signed ERM-6 form from Wayne County on March 30, 2012, and submitted such form to NCCI on April 2, 2012.

36. On April 16, 2012, Zurich sent Wayne County an endorsement to the Policy which stated that an experience modification factor of 1.34 would be effective July 1, 2011 and that, based on the application of such factor, an additional \$88,566 in premium was due for the July 1, 2011 - July 1, 2012 policy period.

37. On May 15, 2012, Ms. Jungmichel sent a letter to Aon on behalf of Wayne County contesting application of the experience modification factor of 1.34 for the July 1, 2011 -

July 1, 2012 policy period, requesting that the endorsement to the Policy which applied an experience modification factor of 1.34 be “overturned.”

38. In her May 15, 2012 letter, Ms. Jungmichel argued that the application of the experience rate modification factor “with no prior notice” violates Tenn. Code Ann. § 50-6-414, in that: (a) notice of the change resulting in an increase in premium was not provided before the effective date of the Policy, and (b) the experience modification worksheet was not sent by certified mail, return receipt requested.

39. Ms. Jungmichel further argued that Wayne County was not provided with notice of its right for review and to appeal to the Commissioner pursuant to Tenn. Code Ann. § 50-6-417 of the determination and that, since Wayne County had previously had workers’ compensation coverage through the Local Government Workers’ Compensation Fund (“LGWCF”), which is unregulated by the Tennessee Department of Commerce and Insurance and “does not follow NCCI protocols,” the attempt to create an experience modification is “virtually impossible” even if Zurich had “followed the statutes regarding procedure which they did not.” Ms. Jungmichel argued that the LGWCF does not use NCCI rates to calculate premium, noting that the LGWCF uses what are termed “Relativity Factors” and “LGIP Factors” rather than NCCI rates, and does not file unit statistical reports or use standard NCCI classification codes. Because of these differences, Ms. Jungmichel argued, the change in the experience modification factor was based on “faulty assumptions” that payroll is classified by NCCI rules and that claims are adjusted as a commercial carrier would do is “like mixing apples and oranges.”

40. In response to the May 15, 2012 letter from Ms. Jungmichel, Aon determined that the experience modification factor should be applied based on the terms of the Policy, TWCIP Plan Document, and NCCI Rules.

41. Wayne County filed an appeal to the Commissioner of Commerce and Insurance on July 26, 2012, contesting the application of an experience modification factor of 1.34 effective July 1, 2011, and assessment of additional premium based on such factor.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, Wayne County, 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 workers' compensation insurer to be a member of the designated rate service organization and to adhere to the policy forms and rating rules filed by the designated rate service organization and approved by the Commissioner.

3. The National Council on Compensation Insurance, Inc. ("NCCI") is the designated rate service organization for the State of Tennessee pursuant to Tenn. Code Ann. § 56-5-320.

4. Tenn. Code Ann. § 50-6-414 provides as follows:

50-6-414. Experience modification factors -- Notification of employers -- Failure to give timely notification.

- a. Any employer who is assigned an experience modification factor for the purpose of determining its workers' compensation premium shall be sent annually, at no charge to the employer, a copy of any information relative to its experience modification factor that is available to an insurance company.
- b. If the experience modification factor notification is not received by the employer prior to the policy renewal date, or the policy anniversary date if different, the experience modification factor shall not be used for premium purposes if its use results in a higher premium for the employer. The mailing of the experience

modification factor worksheet shall be sufficient proof of notice, provided the mailing is by certified mail, return receipt requested.

5. Tenn. Code Ann. § 50-6-417 provides as follows:

In cases where an employer disputes an experience modification factor assigned to the employer, the insurer shall notify the employer of the employer's right to submit a request for review and to appeal to the commissioner of commerce and insurance pursuant to § 56-5-309(b).

6. Wayne County failed to show by a preponderance of the evidence that the endorsement issued by Zurich which applied an experience rating modification factor to the Wayne County workers' compensation Policy, or the additional premium assessed by Zurich based on such factor, was in error. The evidence shows that the calculation and application of the experience modification factor in accordance with NCCI rules was consistent with the Tennessee workers' compensation law and rules, the terms of the TWCIP, and the Policy.

7. The Policy issued to Wayne County on July 26, 2011 expressly provides that the insurance premium was "estimated," subject to "our [Zurich's] manuals of rules, rates, rating plans and classifications. Paragraph E of Part Five of the General Section of the Policy states:

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.

8. Wayne County contends that the change from a 1.00 (unity) to 1.34 loss modification factor, and assessment of a premium surcharge after the effective date of the Policy based on such factor, was unanticipated. However, given the multiple requests to Wayne County by Zurich and Travelers for loss information over a nine-month period, as well as correspondence from Aon, there is substantial evidence that Wayne County was sufficiently apprised of the possibility, if not an expectation, of an increase in its experience modification

rating based on its loss history. There was no evidence presented that would suggest that a representation was made to Wayne County by Aon or Zurich, either before or after Wayne County submitted its June 30, 2011 application for coverage through the TWCIP, that an experience modification factor above 1.10 would not result in an increase in premium. All the documentation referenced in the Policy, including, but not limited to, the Agent Guide and NCCI *Experience Rating Manual* was readily available to Wayne County or its insurance agent, Risk Management Partners, LLC.

9. Wayne County also contends that use for premium purposes of a change from a 1.00 to 1.34 experience modification factor is prohibited by Tenn. Code Ann. § 50-6-414(b), since notice of the experience modification factor calculated by NCCI was not received by Wayne County prior to the effective date of the Policy, July 1, 2011. The fact that an experience modification factor for Wayne County was not calculated until more than nine months after the effective date of the Policy can in large part be explained by the fact that Wayne County did not provide loss history information to Travelers, by properly completing and signing the ERM-6 Form initially provided to it on July 26, 2011, until April 16, 2012. However, since the Policy issued to Wayne County was a new policy, rather than a renewal, Tenn. Code Ann. § 50-6-414(b) is inapplicable, since the statute specifically refers to the “policy renewal date, or the policy anniversary date if different” as to when an experience modification factor notification must be received in order for it to be used for premium purposes. The requirement set forth in Tenn. Code Ann. § 50-6-414(b) that notification of experience modification rating be by certified mail is, therefore, also inapplicable; however, the evidence in this matter indicates that Wayne County received timely notice of the experience modification factor sufficient to request review by the TWCIP plan administrator on May 15, 2012.

10. 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.”

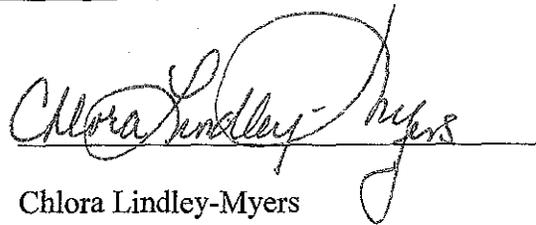
NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows:

1. The decision of American Zurich Insurance Company to apply an experience rating factor of 1.34 to the Policy issued to Wayne County effective July 1, 2011 was consistent with Tennessee law and rules, and was proper;

2. Wayne County owes additional premium of eighty-eight thousand five hundred sixty-six dollars (\$88,566.00), such amount due and payable within sixty (60) days of the date of this Order, subject to any applicable discounts and/or adjustments to which Wayne County may be entitled; and

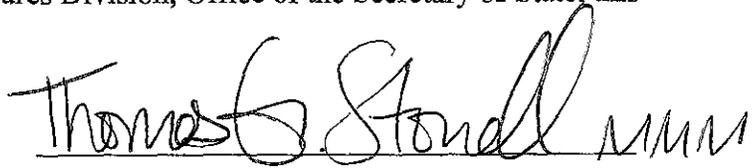
3. Costs of this proceeding are assessed against the Petitioner, Wayne County.

This Final Order is entered and effective this the 27th day of June, 2013.



Chlora Lindley-Myers
Deputy Commissioner
Commissioner’s Designee

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 27, day of June, 2013.



Thomas G. Stovall, Director
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. 0780-01-82-.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 has been served upon the following:

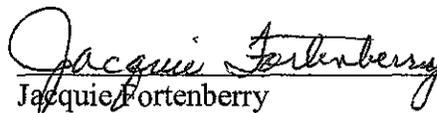
Jane Jennings
Attorney at Law
P. O. Box 794
Lawrenceburg, Tennessee 38464

Waverly D. Crenshaw, Jr.
Stephanie A. Roth
Attorneys at Law
Waller Lansden Dortch & Davis, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219-8966

Ben M. Rose
The Law Offices of Ben M. Rose, PLLC
P. O. Box 1108
Brentwood, Tennessee 37024

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

This the 27th day of June, 2013.



Jacquie Fortenberry