

**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:)
)
IMPACT EXPRESS, LLC)
)
and)
)
BERKLEY REGIONAL INSURANCE)
COMPANY)

**Docket No. 12.28-122060A
WC Appeal - Insurance**

FINAL ORDER

This matter was heard on December 16, 2013 before the Honorable Lynn England, 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 and 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, Impact Express, LLC ("Impact"), was represented by Attorney Timothy A. Drown. The Respondent, Berkley Regional Insurance Company ("Berkley"), was represented by Attorney J. Allen Callison.

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 subject of the hearing was whether the drivers engaged by Impact should be considered employees or independent contractors pursuant to Tenn. Code Ann § 50-6-102(10)(D) or "leased operators" in accordance with Tenn. Code Ann. § 50-6-106(1)(A), and also whether Impact otherwise owes additional premium based on the potential liability of Berkley related to potential legal actions involving the terms of the workers' compensation.

Upon consideration of the record, it is determined that the drivers should be considered independent contractors, rather than employees. Based on the risk of loss provisions of the workers' compensation insurance policy, however, Impact owes additional premium to Berkley in the amount of twelve thousand eight hundred eighty-three dollars (\$12,883.00).

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

FINDINGS OF FACT

1. Impact Express, LLC is a commercial trucking company with offices in Cordova, Tennessee, of which Deepak Karawadra ("Mr. Karwadra") is the sole officer.
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. Berkley is a workers' compensation insurer licensed to sell workers' compensation insurance coverage in Tennessee and was at all relevant times the servicing carrier for Impact's workers' compensation insurance coverage through the TWCIP. Administrative services are

provided on behalf of Berkley by its subsidiary and servicing agent, Berkley Assigned Risk Services (referred to herein, individually and collectively with Berkley, as "Berkley").

4. Impact submitted an application for workers' compensation insurance coverage through the TWCIP on November 22, 2011. The application stated that Impact had two full-time clerical office employees with total annual remuneration /payroll of \$54,000.00, and indicated that it employed drivers as subcontractors or independent contractors who had obtained their own workers' compensation insurance coverage.

5. TWCIP Workers' Compensation and Employers' Liability Policy Number WC-41-41-021709-00 (the "Policy") was issued to Impact for the period of November 23, 2011 through November 23, 2012 (the "Policy Period") and assigned to Berkley as the servicing carrier, with policy limits as follows:

Bodily Injury By Accident - \$100,000 each accident
Bodily Injury By Disease - \$500,000 policy limit
Bodily Injury By Disease - \$100,000 for each employee

6. Impact paid a premium of \$391.00 for the Policy Period based on the information contained in the Application.

7. On January 20, 2012, the \$100,000 limits of the Policy were increased upon Impact's request to \$500,000.00, increasing the total annual premium by \$100.

8. Pertinent terms of Policy are as follow:

* * * *

PART ONE--WORKERS' COMPENSATION INSURANCE

* * * *

B. We Will Pay

We will pay promptly when due the benefits required of you by the workers' compensation law.

C. We Will Defend

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance.

We have the right to investigate and settle these claims, proceedings or suits. We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

* * * *

PART FIVE--PREMIUM

* * * *

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 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.

* * * *

9. Mr. Karawadra testified that he paid premiums for workers' compensation insurance prior to November 23, 2011, which included coverage for drivers, but subsequently determined that such coverage was unnecessary because the drivers were independent contractors.

10. Five drivers for Impact obtained workers' compensation coverage during the Policy Period through Clay & Land Insurance Company. Applicable premiums were paid from an Impact checking account to Clay & Holley Finance Company. The amount of the premiums were withheld from commissions paid to the drivers for work performed.

11. The Certificates of Liability Insurance for the workers' compensation coverage obtained by the drivers indicates that the policies issued to them excluded coverage of any proprietor, partner, executive officer or member.

12. Impact does not provide benefits for any other type of insurance or reimburse drivers for physical exams, tools to load or unload trucks, or other expenses associated with deliveries.

13. Impact did not complete the Tennessee Department of Labor and Workforce Development Form I-14 used to indicate that a leased operator and/or leased owner-operator of a motor vehicle(s) under contract with a common carrier is electing coverage under the Tennessee Workers' Compensation Law.

14. Drivers engaged by Impact were required to sign an "Independent Contractor Agreement" prior to driving on behalf of Impact. The Agreement provides that Impact may terminate such Agreement at any time, that Impact retained ownership of any work product developed by the driver in connection with his work for Impact, and that the driver is prohibited from competing with Impact "in any form or fashion in any service [Impact] provides during the [driver's] work with [Impact] for the minimum term of 5 years." Paragraph 8 of such Agreement contained a merger and integration, stating that the Agreement "contains the entire agreement of the parties, and there are no other promises or conditions in any other agreement whether oral or written."

15. Mr. Karawadra testified that drivers can and do work for other companies, and do not have to accept delivery work offered by Impact.

16. Mr. Karawadra testified that he maintains a list of approved drivers whom he contacts about each job, although some drivers used by Impact have set schedules and drive on a regular basis.

17. Each driver is required to pass a drug screen and background check.
18. Drivers are not allowed to find substitute drivers because, as Mr. Karawadra testified: "We don't just allow anybody to come in. We still have to maintain control."
19. Mr. Karawadra testified that he contacts the drivers, tells them when and where to make the pick-up and when and where the drop off is to be made.
20. Mr. Karawadra testified that there is not an open bidding process, but individual drivers can negotiate commissions.
21. Drivers were required to use a particular fuel card to purchase fuel, the cost of which was deducted from commissions paid to the drivers.
22. The drivers leased trucks from Impact Express at the rate of \$80 per day and ten cents per mile or, for shorter routes, \$10 per hour and ten cents a mile; however, there was no written lease agreement between Impact and the drivers. Lease costs were deducted from payments to drivers.
23. Drivers were paid weekly based on loads driven.
24. The Form 1040 Schedule submitted by Impact for the 2011 tax year indicated gross income of \$710,042 from trucking operations, \$271,258 in fuel costs, \$111,767 for lease of vehicles, \$188,089 in contract labor, and \$75,520 in asset depreciation for his vehicles during the 2011 calendar year.
25. The actual amount of remuneration paid by Impact to its drivers during the Policy Period was \$214,854.
26. On November 23, 2012, Berkley requested that Impact provide documentation in order to compute the final premium.
27. In response to the November 23, 2013 letter from Berkley, Impact provided documentation on December 10, 2012, reporting wages for the two clerical employees of \$37,746.

Impact also provided a copy of the Independent Contractor Agreement, the certificates of workers' compensation insurance for three of the drivers, contracts between those drivers and Clay & Holley Insurance Agency, and a copy of portions of Impact's 2011 tax return.

28. Berkley sent a Premium Audit Adjustment letter to Impact on February 21, 2013, stating that the drivers should be classified as employees under the Tennessee Workers' Compensation Law based on the contracts signed by the drivers and that Impact owed additional premium of \$9,332 based on remuneration/payroll of \$165,569 and a classification of Class Code 7380 based on the application, which described the business as a "delivery service."

29. On March 22, 2013, Berkley received a letter from Mr. Karawadra that disputed the audit results and stated that the drivers are independent contractors responsible for their own workers' compensation insurance and stated that the "non-compete" provision in the Independent Contractor Agreement only prevents drivers from driving for an Impact customer. Mr. Karawadra further stated that Impact did not provide any benefits, 401 plan or vacation pay, or reimburse the drivers for expenses.

30. Berkley obtained a payment log after the dispute in this matter arose indicating that actual remuneration to the drivers was \$214,854, based on which Berkley advised that the additional premium due under the Policy was \$12,883.

31. Berkley sent a Notice of Cancellation to Impact on March 18, 2013, advising that the Policy would be terminated for non-payment of premium unless \$9,332 of the premium was paid before April 2, 2013.

32. Berkley subsequently engaged a collection service company, Receivable Management Services, which requested payment from Impact of \$9,322 on November 13, 2013.

33. Impact filed an appeal by letter dated June 25, 2013, which was received by the Department of Commerce and Insurance on July 9, 2013.

CONCLUSIONS OF LAW

1. In accordance with Tenn. Comp. R. and Regs. 1360-04-01-.02(3) and (7), the Petitioner, Impact 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. § 50-6-102 provides in pertinent part as follows:

50-6-102. Chapter definitions.

As used in this chapter, unless the context otherwise requires:

* * * *

(10)(A) "Employee" includes every person, including a minor, whether lawfully or unlawfully employed, the president, any vice president, secretary, treasurer or other executive officer of a corporate employer without regard to the nature of the duties of the corporate officials, in the service of an employer, as employer is defined in subdivision (11), under any contract of hire or apprenticeship, written or implied. Any reference in this chapter to an employee who has been injured shall, where the employee is dead, also include the employees legal representatives, dependents and other persons to whom compensation may be payable under this chapter;

* * * *

(D) In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:

- (i) The right to control the conduct of the work;
- (ii) The right of termination;
- (iii) The method of payment;
- (iv) The freedom to select and hire helpers;
- (v) The furnishing of tools and equipment;
- (vi) Self-scheduling of working hours; and
- (vii) The freedom to offer services to other entities;

* * * *

3. Tenn. Code Ann. § 50-6-114(a) provides:

No contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer, in whole or in part," of any obligation created by this chapter, except as provided in subsection (b).

4. In evaluating the factors set forth in Tenn. Code Ann. § 50-6-102(10)(D), Tennessee courts have consistently emphasized the right to control work, rather than whether such right is exercised, although no single factor set forth is determinative. *Galloway v. Memphis Drum Service*, 822 S.W.2d 584 (Tenn. 1991). The testimony indicates that the drivers for Impact in most cases accepted and completed work without the supervision of Mr. Karawadra, were solely responsible for loading and unloading trucks, and hiring helpers. Mr. Karawadra retained the right to terminate drivers at any time and required drivers to use the fuel card he provided. In accordance with Tenn. Code Ann. § 50-6-114(a), the Independent Contractor Agreement which the drivers were required to sign does not operate to define the employment relationship of the drivers. Berkley argues, however, that the non-compete provision of such Agreement indicates a degree of control, notwithstanding Impact's argument that such provision was intended to be applicable only to Impact's customers and was, in any event, overly broad and unenforceable. Although drivers were authorized to engage helpers, they were not authorized to find a substitute driver without the approval of Mr. Karawadra. Berkley argues that the fact that Impact had to approve substitute drivers and required drug screens and background checks on drivers before they were added to the list of Impact's list of approved drivers indicates that Impact exercised some degree of control. Berkley also cites the fact that the cost of fuel that was deducted from commissions paid to the drivers indicates a degree of control, as well as furnishing tools and equipment. The Tennessee Supreme Court has held that "control is not relevant in determining whether a trucking company is an employer as defined by Tenn. Code Ann. § 50-6-106(1)(A)." *Honsa v. Tombigbee Transport Corp.*, 141 S.W.3d 540 (Tenn. 2004).

5. Tenn. Code Ann. § 50-6-106(1) provides in pertinent part as follows:

This chapter shall not apply to:

- (A) Any common carrier doing an interstate business while engaged in interstate commerce, which common carrier and the interstate business

are already regulated as to employer's liability or workers' compensation by act of congress, it being the purpose of this law to regulate all such business that the congress has not regulated in the exercise of its jurisdiction to regulate interstate commerce; provided, that this chapter shall apply to those employees of the common carriers with respect to whom a rule of liability is not provided by act of congress; provided, further, that no common carrier by motor vehicle operating pursuant to a certificate of public convenience and necessity shall be deemed the employer of a leased-operator or owner-operator of a motor vehicle or vehicles under a contract to such a common carrier;

- (B) Notwithstanding subdivision (1)(A), a leased operator or a leased owner/operator of a motor vehicle under contract to a common carrier may elect to be covered under any policy of workers' compensation insurance insuring the common carrier upon written agreement of the common carrier, by filing written notice of the contract, on a form prescribed by the commissioner, with the division; provided, that the election shall in no way terminate or affect the independent contractor status of the leased operator or leased owner/operator for any other purpose than to permit workers' compensation coverage. ...

* * * *

6. The parties agree that Impact is a "common carrier" within the meaning of the Tennessee Workers' Compensation Law, but disagree as to whether the drivers are leased-operators under contract with a common carrier. Tenn. Code Ann. § 50-6-106(1)(A) exempts common carriers from the requirement to obtain workers' compensation insurance coverage where the common carrier is regulated as to employer's liability or workers' compensation insurance by Act of Congress (as, for example, under federal maritime law and/or the Jones Act) and when the carrier is under contract with a leased-operator or owner-operator.

7. Tenn. Code Ann. § 50-6-106(1)(B) provides a method under which a leased-operator under contract with a common carrier can elect to be covered under the workers' compensation policy of the carrier without losing any status it has as an independent contractor. A common carrier can provide workers' compensation insurance coverage under the Tennessee Workers' Compensation Law to a leased operator and/or leased owner/operator by filing a Form I-14 with the Department of Labor and Workforce Development, Tennessee Workers' Compensation Division. Tenn. Comp. R. & Regs. 0800-02-01-.15(10). Tenn. Code Ann. § 50-6-

106(1)(B) does not, however, exempt a common carrier from any responsibility it otherwise has under the Workers' Compensation Law. Filing, or failing to file a Form I-14, does not impact whether an individual engaged by the carrier is an independent contractor if a driver can be considered an "employee" under the seven factors specified in Tenn. Code Ann. § 50-6-102(10)(D).

8. The Federal Motor Carrier Safety Administration has issued rules and regulations that govern leasing of motor vehicles of common carriers. 49 CFR Part 376.11 provides that the authorized carrier may perform authorized transportation in equipment it does not own only under a written lease granting the use of the equipment and meeting the requirements contained in 49 CFR Part 376.12. Written lease requirements set forth in Part 376.12 include the names of the authorized carrier and the owner of the equipment, and provisions which address the exclusive possession and responsibilities of the lessor and the lessee, compensation paid to the lessee for the equipment, and other specific provisions. Mr. Karawadra testified that there was no written lease between Impact and the drivers, only a "handshake agreement." The evidence presented in this matter does not indicate that Impact entered into a lease agreement, oral or written, which meets the requirements specified under Federal law. It is not, therefore, clear that the drivers must be considered leased-operators as a matter of law pursuant to Tenn. Code Ann. § 50-6-106(1)(A).

9. Impact has shown by a preponderance of the evidence that its drivers should be considered independent contractors. However, whether or not the drivers for Impact should be considered as employees or independent contractors, the Court of Appeals has stated that there should also 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.*, the Court of Appeals identified two categories of individuals for whom the insured

would be charged premiums in the workers' compensation insurance policy: (1) "[a]ll your officers and employees engaged in work covered by this policy" (the "Employee Provision"); and (2) "[a]ll other persons engaged in work that could make us liable under Part One (Workers' Compensation Insurance) of this policy" (the "Risk of Loss Provision"). *Continental Casualty Co. v. Theraco, Inc.*, No. M2012-02100-COA-R3-CV (Tenn. Ct. App., January 14, 2014). The Court of Appeals in *Theraco* held that it was only necessary to determine whether the insurers would have had 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 p. 17. The court determined that, regardless of the workers' 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.* at 17. See *Hartford Underwriters Ins. Co. v. Penney*, No. E2009—0 1330--14-COA-R3-CV, 2010 WL 2432058, at *1 (Tenn. Ct. App. June 17, 2010); *CNA (Continental Casualty,) v. King*, No. M2004-02911-COA-R3-CV, 2006 WL 2792159, at *1 (Tenn. Ct. App. Sept. 28, 2006).

10. The same risk of loss provision cited in *Theraco* is contained in the Policy issued by Berkley to Impact. As the policies issued to the drivers covered employees of the drivers rather than the drivers, it was appropriate for Berkley to calculate premium based on the remuneration/payroll of the drivers. Based on the evidence presented in this matter, Berkley would have been responsible for defending any workers' compensation claims brought against Impact by its drivers, whether or not the claims had merit or Berkley prevailed in establishing that the drivers were independent contractors.

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

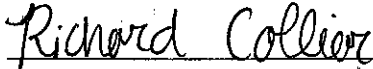
1. The drivers engaged by Impact Express, LLC should be considered independent contractors; however, in accordance with the risk of loss provisions of the Policy, the payroll/remuneration of Impact's drivers should be considered in calculating applicable premium due upon retrospective audit.
2. Impact shall pay additional premium to Berkley Regional Insurance Company in the amount of twelve thousand eight hundred eighty-three dollars (\$12,883) for the November 23, 2011—November 23, 2012 Policy Period within sixty (60) days of this Order.
3. The costs of this matter shall be taxed against the Petitioner, Impact Express, LLC.



Maliaka Bass
Commissioner Designee

Filed in the Administrative Procedures Division, Office of the Secretary of State, this

27 day of March, 2014.



Richard Collier, Director LAD
Administrative Procedures Division

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 27 day of March, 2014:

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