No. 127140

IN THE
SUPREME COURT OF ILLINOIS

PRATE ROOFING AND INSTALLATIONS, LLC, Plaintiff-Appellee, v. LIBERTY MUTUAL INSURANCE CORPORATION, Defendant-Appellant, and THE ILLINOIS DEPARTMENT OF INSURANCE; ROBERT H. MURIEL, in His Official Capacity as Director of Insurance; and PATRICK RILEY, in His Capacity as Hearing Officer, Defendants-Appellees.	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-19-1842, There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 18 CH 09826, The Honorable CAROLINE KATE MORELAND, Judge Presiding.

BRIEF AND SUPPLEMENTARY APPENDIX OF DEFENDANTS-APPELLEES

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NATURE OF THE ACTION

This case arose as an action for administrative review of a final decision of the Director of the Illinois Department of Insurance ("Department")[1] that resolved a dispute between an insurer, Defendant-Appellant Liberty Mutual Insurance Company ("Liberty"), and its insured, Plaintiff-Appellee Prate Roofing and Installations, LLC ("Prate"), concerning workers' compensation insurance premiums. The Director ruled in Liberty's favor, and Prate brought a complaint in the circuit court for administrative review and a declaratory judgment as to the amount owed. The circuit court affirmed the Director's decision and dismissed the claim for declaratory judgment.

Prate appealed. While its appeal was pending, the Illinois Appellate Court issued the decision in *CAT Express, Inc. v. Muriel*, 2019 IL App (1st) 181851, holding that the Department lacked both general authority under the Illinois Insurance Code ("Code") to resolve insurance premium disputes, and specific statutory authority to decide the issue in that case — whether certain workers were employees or independent contractors for purposes of determining workers' compensation insurance premiums owed. Prate and the Department argued that the reasoning in *CAT Express* controlled this case,

[1] Before the appellate court issued its decision in this case, the Director of the Department named in the case caption, Robert Muriel, was succeeded by Acting Director Dana Popish Severinghaus. *See* https://www.illinois.gov/news/press-release.22583.html (last visited Feb. 16, 2022). Severinghaus should be substituted for Muriel per section 2-1008(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-1008(d) (2020).

and the appellate court agreed. Accordingly, as it had in *CAT Express*, the appellate court vacated the Director's decision as void and vacated the circuit court's judgment affirming that decision. It also affirmed the dismissal of the claim for declaratory judgment.

Liberty sought and obtained this Court's review, challenging the ruling that the Director's decision was void for lack of statutory authority and urging affirmance of the Director's decision on the merits.

ISSUE PRESENTED FOR REVIEW

Whether the Department lacked statutory authority to resolve the dispute between Liberty and Prate under section 462 of the Code, 215 ILCS 5/462 (2020), because the dispute did not meet the criteria of the statute.

STATUTE INVOLVED

The principal provision at issue in this case is section 462 of the Illinois Insurance Code, which provides:

> Information to be furnished insureds — Hearings and appeals of insureds
>
> Every rating organization, and every company which does not adopt the rates of a rating organization, shall, within a reasonable time after receiving written request therefor, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, in readily understandable language, all pertinent information as to such rate as specified in rules adopted by the Department.
>
> Every rating organization, and every company which does not adopt the rates of a rating organization, 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 company fails to grant or reject such request within thirty 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 company on such request may, within thirty days after written notice of such action, appeal to the Director, who, after a hearing held upon not less than ten days' written notice to the appellant and to such rating organization or company, may affirm or reverse such action.

215 ILCS 5/462 (2020).[2]

Additional provisions relevant to the parties' arguments — 215 ILCS 5/462b (2020); National Council on Compensation Insurance Basic Manual Rule 12-H; Idaho Code § 41-1622(2) — are in this brief's appendix.

[2] Citations to the Illinois statutes here and throughout this brief are to the 2020 versions because the statutes have not been amended in any significant way since the Director's decision.

STATEMENT OF FACTS

I. Background

In 2013, Prate, a roofing contractor in Illinois, obtained a workers' compensation policy under the Illinois Assigned Risk Plan, which provides workers' compensation insurance coverage through a risk pool administered by the National Council on Compensation Insurance ("NCCI"). (C 19, 220-22). Liberty was assigned to carry the insurance for the policy. (C 19).

Prate later chose to renew the policy from October 2014 to June 2015. (*Id.*). During that time, Liberty audited Prate's records to determine whether Prate had collected certificates of insurance from all of its subcontractors. (*Id.*). When the audit disclosed that one of the subcontractors, ARW Roofing, LLC ("ARW"), did not have workers' compensation insurance, Liberty concluded that the omission had exposed it to more liability than it previously bargained for, and demanded payment of an additional premium of $127,305.00. (*Id.*).

II. The Appeals Board

Prate challenged Liberty's decision that it was entitled to the additional premium before the Illinois Workers' Compensation Appeals Board ("Board") (*see* C 19-20, 106-08) — which provides dispute resolution services under the auspices of the NCCI, *see* https://www.ncci.com/Articles/Pages/UW_disputeresolutionprocess.aspx (last visited Feb. 16, 2022).

In June 2016, the Board informed the parties that it lacked "sufficient information to rule on" the issues and "suggest[ed]" that Prate "appeal" to the Department. (C 107). The Board explained that because "no policy declaration forms" were provided for two of the entities involved, it "could not confirm or refute whether coverage existed for these entities," and it "could not determine whether the legal status issue of ARW being an LLC or an Inc. when work was performed had a bearing on this dispute." (*Id.*).

III. Proceedings Before the Department

Prate then requested a hearing from the Department, invoking sections 401, 402, 403, and 462 of the Code, 215 ILCS 5/401-03, 462. (C 17, 105). The parties filed multiple statements with the Department stating their positions. (*See* C 387-92, 426-34, 449-57 (Prate); C 188-202, 413-24, 437-47 (Liberty)).

Relevant here, Liberty argued that it correctly imposed the additional premium based on the Illinois Workers' Compensation Act, 820 ILCS 305/1(a)(3); the terms of the insurance policy; and the rules in the NCCI's Basic Manual for the Illinois Assigned Risk Plan ("Manual"). (C 188, 193-95). It asserted that, under Rule 2-H of the Manual, an "additional premium" was to be charged against a contractor for an "uninsured subcontractor's employees," and that ARW was an uninsured subcontractor within the meaning of Illinois statutes and "common law." (C 194-98, 201).

Liberty further explained, through an exhibit to its filings, that Prate had not presented adequate evidence of the payroll for its employees, and so

Liberty had estimated the labor cost using the default method provided by the tables attached to Rule 2-H. (C 351). The tables directed that where a contractor failed to furnish adequate evidence of insurance, and the job involved "[l]abor only," then the additional premium should be calculated at "[n]ot less than 90% of the subcontract price." (*Id.*).

Prate responded that no additional premium was warranted because, while ARW was a subcontractor that lacked insurance, it also lacked employees and so failed to trigger the Rule. (C 391). Prate claimed that ARW had sub-subcontracted all of its work to another subcontractor, Reliable Trade Services, Inc. ("RTS"), and that RTS had workers' compensation insurance for its employees — and therefore ARW's lack of insurance could not have exposed Liberty to additional liability. (*Id.*). In addition, Prate claimed that it had provided adequate evidence of ARW's actual labor cost, and so Liberty was not entitled to base the additional premium on the contract price. (C 456).

IV. The Director's Decision

After a hearing on written submissions before a hearing officer, the Director of the Department issued a decision in May 2018 ruling in Liberty's favor (C 15-25), finding that ARW's lack of insurance had increased Liberty's potential liability under sections 1(a)(3) and 4(a)(3) of the Illinois Workers' Compensation Act ("WCA"), which made businesses liable for payment of compensation to the employees of any uninsured contractor or subcontractor (*see* C 22-23 (citing 820 ILCS 305/1(a)(3), 4(a)(3))). The Director rejected

Prate's argument that ARW had no employees of its own but instead used labor supplied by RTS, explaining that Prate's evidence lacked credibility and was contradicted by evidence that RTS sometimes paid ARW for completing its unfinished contracts. (C 21-22). The Director also concluded that Liberty properly calculated the additional premium based on the contract price. (C 23-24). Prate sought rehearing (C 27-28, 569-73), which the Director denied (C 27-29).

V. Proceedings in the Circuit Court

Prate filed a complaint in the circuit court, naming as defendants the Department, the Department's Director, and the Department's hearing officer, as well as Liberty. (C 11-14). The complaint contained two counts: one for administrative review of the Director's decision (count I) (C 11-13), and one for a declaratory judgment concerning the "correct amount" of the premium owed by Prate to Liberty (count II) (C 13), because the Director had stated in denying Prate's petition for rehearing that "[i]t [wa]s not for the Department to determine the specific amount of the premium charge, but [to ensure] that the parties under contract conduct[ed] themselves within the statutory and regulatory bounds of Illinois law" (*id.*).

The Department defendants moved to dismiss the hearing officer as an unnecessary party and to dismiss count II of the complaint, arguing that a claim for declaratory judgment was not an appropriate vehicle for obtaining judicial review of an agency decision. (C 48-50). In December 2018, the circuit

court granted the motion to dismiss "without prejudice," stating that the hearing officer was dismissed as a defendant and that count II was dismissed as "procedurally improper." (C 81).

In August 2019, the circuit court disposed of the "count for Administrative Review" by "affirm[ing]" the Director's decision. (C 660).

VI. The Appellate Court's Decision

Prate appealed. (C 662-63). The appellate court thereafter issued its decision in *CAT Express*, 2019 IL App (1st) 181851, another case in which Liberty was a party, *see, e.g.*, *id.* at ¶ 1 — which held that neither section 401 nor section 462 of the Code, 215 ILCS 5/401, 462, authorized the Department to hear a premium dispute centered on whether certain workers were employees or independent contractors for purposes of calculating worker's compensation insurance premiums owed, *see CAT Express*, 2019 IL App (1st) 181851, ¶¶ 13, 17-32.

The appellate court explained that section 401 of the Code did not include a grant of authority to hear such disputes but only articulated the powers to be exercised when the Department was fulfilling its mandate to efficiently administer the insurance laws of Illinois, *see id.* at ¶¶ 20-23 (citing 215 ILCS 5/401(c)), and that section 462 authorized the Department to hear disputes that concerned only the "application" of a "rating system," *id.* at ¶¶ 24-32, which, for NCCI, comprised an "experience rating plan," "classification system," and "manual rules," *id. at* ¶ 31. Because the parties'

dispute did not involve "interpretation or application" of any of those three elements of the rating system, but rather "factual determinations regarding the scope of coverage" under the insurance contract, the appellate court held that section 462 was not a proper source of authority to decide the issue raised in the case, *id.* at ¶¶ 23-25, 31-32, and that the Director's decision was void, *id.* at 35. Accordingly, the appellate court vacated the circuit court's judgment affirming the Director's decision, and likewise vacated the Director's decision. *Id.* at 35-39.

Then, in March 2021, the appellate court issued its decision in this case, *see Prate Roofing & Installations, LLC v. Liberty Mutual Ins. Corp.*, 2021 IL App (1st) 191842-U, concluding, on the issue of the Department's statutory authority, that *CAT Express* was "dispositive" of this case, *id.* at ¶¶ 47, 58. The appellate court noted that Liberty had disclaimed any reliance on section 401 and was arguing only that here, unlike in *CAT Express*, the Department had authority under section 462. *Id.* at ¶ 46. But the court "specifically reject[ed]" Liberty's attempt to invoke section 462 by characterizing the present dispute as involving "simply an analysis" of Rule 2-H. *Id.* at ¶ 58. It explained that the parties' dispute was not about the rule because it was based on "findings of fact and conclusions of law" that had to be made before the rule could be applied. *Id.*

Liberty sought and obtained this Court's review, challenging the ruling that the Director's decision was void for lack statutory authority and urging affirmance of the Director's decision on the merits.

ARGUMENT

This Court Should Affirm the Appellate Court's Judgment That the Department Lacked Statutory Authority to Hear the Parties' Dispute.

Although Liberty and Prate debate the merits of the Director's decision, before this Court, as they did before the appellate court, the Department addresses only the question whether it had statutory authority to entertain the parties' dispute. The Department's sole concern is for this Court to clarify the scope of its statutory authority to resolve disputes between insurers and insureds concerning the calculation of workers' compensation premiums.

A. The Standard of Review Is *De Novo*.

This Court reviews *de novo* questions concerning the "scope of powers conferred on an administrative agency by its enabling legislation" because such questions raise issues of statutory interpretation. *Julie Q. v. Dep't of Children & Family Servs.*, 2013 IL 113783, ¶ 20; *Genius v. Cnty. of Cook*, 2011 IL 110239, ¶ 25 (same). The agency is not given deference on such issues because its "expertise is not implicated" and the "determination of the scope of its power and authority is a judicial function." *See Goral v. Dart*, 2020 IL 125085, ¶ 42 (explaining why plaintiffs were not required to exhaust challenges to scope of agency authority). Moreover, on *de novo* review, this Court is not bound by the appellate court's reasoning and may affirm on any basis supported by the record and law. *See People v. Julie M. (In re Julie M.)*, 2021 IL 125768, ¶ 75.

B. The Plain Language and Context of Section 462 Establish That the Department May Resolve Disputes Only About the Interpretation of the NCCI's Rules.

Because the Department is a "creature of statute," it has no "general or common-law powers," and any action that it takes must be authorized, either expressly or by implication, by its enabling act. *See Goral*, 2020 IL 125085, ¶ 33; *Crittenden v. Cook Cnty. Comm'n on Human Rights*, 2013 IL 114876, ¶ 14. As the appellate court noted in *CAT Express*, 2019 IL App (1st) 181851, ¶ 23, no provision in the Code generally authorizes the Department to resolve disputes about the calculation of workers' compensation insurance premiums. The Department's responsibilities are predominantly regulatory rather than adjudicatory: it "administer[s] the insurance laws of this state, not individual insurance contracts between an insurer and an insured." *Id.* Disputes over the amount of insurance premiums are appropriately handled by the circuit courts in "contract actions involving the scope of coverage." *Id.* at ¶ 34. Thus, section 462 of the Code represents an exception to the ordinary treatment of individual insurance disputes in that it allows recourse to the Department at all.

The function of section 462 is to ensure that insurers are accurately interpreting the rules under which the parties contract. As the appellate court correctly held, it "vests the Department with specific and limited authority" that is confined to grievances about the "interpretation or application" of the NCCI's "experience rating plans, its classification system," and "its manual

rules." *Id.* at ¶ 31. The statute does not extend the Department authority to address *all* questions that could potentially arise under a worker's compensation insurance contract. That would go far beyond the Code's plain language and intent.

When interpreting section 462, as when interpreting any statute, this Court's main goal is to give effect to the legislative intent behind its enactment. *See People v. Burge*, 2021 IL 125642, ¶ 20. The best evidence of that intent is the statute's language, given its "plain and ordinary meaning." *Id.* The plain meaning of a statute is defined by its language and the context in which that language is used — both the immediate context of the particular provision and the broader context of the statute as a whole. *See People v. Clark*, 2019 IL 122891, ¶ 85. When the meaning of a statute is plain and unambiguous, the Court may not depart from its terms by reading into it "exceptions, limitations, or conditions [that] the legislature did not express." *Burge*, 2021 IL 125642, ¶ 20.

As explained below, with these principles in mind, it is clear that the Department did not have statutory authority to hear the dispute in this case. Section 462 provides that a necessary condition for invoking the Board's "review" — and thus, in turn, for "appeal[ing]" to the Department — is that the person seeking review must have been "aggrieved by the application of" the "rating system" of a "rating organization," such as the NCCI. *See* 215 ILCS 5/462 (2020). In that event, the aggrieved person (the insured) is

entitled to "review" of the "manner in which such rating system has been applied in connection with the insurance afforded him." *Id.*

When viewed in context, this language shows a legislative intent to limit the types of disputes that may be resolved under this section to those about the proper interpretation of the rating system, or "rules,"[3] of the rating organization. Three considerations support this view.

1. The Plain Meaning of "Application" Is "Interpretation."

First, the word "application," in this context, means "interpretation." Although it has several meanings, "application" is generally interchangeable with "interpretation" when used in connection with the principles set forth in a statute or ruling, or, as here, an organization's rules. *See, e.g.*, *Crim v. Dietrich*, 2020 IL 124318, ¶¶ 20-21 (citing Black's Law Dictionary 1366 (9th ed. 2009) for its definition of the term "'question of law'" as an issue "'concerning the *application or interpretation* of the law'") (emphasis added); *cf. CAT Express*, 2019 IL App (1st) 181851, ¶ 31 (referring to "interpretation or application" of the NCCI's rules).

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[3] Although *CAT Express* designated "manual rules" as one of the three elements that comprise the NCCI's rating system, *see supra* p. 9, for simplicity's sake, this brief will adhere to the NCCI website's convention of referring to all three elements of the system, collectively, as "rules." The website states that: "For purposes of this [Dispute Resolution] Process, manual rules are defined as rules in NCCI's manuals that pertain to the application of the workers compensation rating system used as the basis for premium calculation, including but not limited to classifications and experience rating." *See* https://www.ncci.com/Articles/Pages/UW_disputeresolutionprocess.aspx (last visited Feb. 16, 2022).

Moreover, in the administrative context, the word "application" points not just to interpretation generally, but to a particular kind of interpretation. It is commonly used as a part of the phrase "application of law to fact," which refers to a "mixed question" that "cannot be accurately characterized as either a pure question of fact or a pure question of law." *See, e.g., Carpetland U.S.A., Inc. v. Ill. Dep't of Emp. Sec.*, 201 Ill. 2d 351, 368-69 (2002); *By the Hand Club for Kids, NFP, Inc. v. Dep't of Emp. Sec.*, 2020 IL App (1st) 181768, ¶ 17 (echoing same phrase in same context). This kind of interpretation does not answer questions that are independent of the facts of the case, but begins with the particular facts as given and relates those facts to a statutory standard. *See Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 211 (2008); *see also City of Belvidere v. Ill. State Labor Rels. Bd.*, 181 Ill. 2d 191, 205 (1998) (construing statutory phrase "wages, hours and other conditions of employment"). It is designed to afford "some deference" to the administrative agency and allow the agency's "experience and expertise" to inform the resulting decision. *City of Belvidere*, 181 Ill. 2d at 205.

To be sure, section 462 concerns "application" of industry-generated rules rather than statutes, but its use of the word "application" is clearly analogous because the Board is an agency charged with reviewing "application" of the rules and, as the NCCI's website makes clear, the "issues" that the Board addresses, those that "involve [its] manual rules," typically fall into the category of mixed questions. *See* https://www.ncci.com/Articles/pages/

UW_disputeresolutionprocess.aspx?s=dispute#Q2 (last visited Feb. 16, 2022). The "examples" provided by the website are: "Application of correct class code(s) to a business's payroll," "Allocation of business payroll among class codes," "Application of an experience rating modification factor," and "Combination of the experience of one business with that of another." *Id.*

The phrase "application of law to fact" means interpretation that involves a mixed question, and the Board's principal function is to resolve mixed questions. Thus, by asking the Board to review "application" of the NCCI's rules to the facts in section 462, the Illinois General Assembly signaled that it was invoking the Board's function of interpreting the rules in terms of particular facts. And it limited the Department's review, which it authorized to occur exclusively in an appellate capacity, to considering interpretive issues raised before the Board. *See* 215 ILCS 5/462 (2020) (providing for "appeal" to the Department's Director).

2. The Use of the Phrase "Aggrieved By" Application of the Rating System Means That the Dispute Must Be About the Proper Interpretation of the Rules.

Second, section 462 expressly requires that the person raising the dispute be "*aggrieved by* the application" of the rules. 215 ILCS 5/462 (2020) (emphasis added). This means that the rules must not only have been applied in calculating the premium under dispute, but their "application," or interpretation, must also be the source of the grievance.

As the appellate court here noted, a person cannot be aggrieved *by* application of rules that were correctly interpreted. *See CAT Express*, 2019 IL App (1st) 181851, ¶ 27. If there is no dispute about the meaning of the rules, then the insured must have been aggrieved by some other element of the process of calculating the premium, such as a finding of fact. *See id.* (noting that "CAT was not aggrieved by application of the NCCI rating system; CAT was aggrieved by Liberty's determination as to the number of workers to which the rating system applied when calculating the adjusted premium").

Moreover, an insured cannot properly be considered to be aggrieved by application of the rules where, as here, it disputes issues of fact or raises questions about the proper interpretation of the WCA, on the theory that those issues are somehow part of the "application" process. Issues of law and issues of fact are analytically distinguishable from issues requiring application of law to fact — which is why there are three different standards of review in administrative review cases. *See Carpetland U.S.A.*, 201 Ill. 2d at 369. And this Court's precedents refer to the facts and the governing law as having been resolved — being "established" or "undisputed" — before the process of applying the law even begins. *See, e.g., Cinkus*, 228 Ill. 2d at 211.

Additionally, in requiring that the insured be "aggrieved by" application of the rules, the General Assembly clearly intended that the grievance be based on particular issues of interpretation and not merely on an assertion that the amount of the premium was incorrect. Had the General Assembly been

concerned in section 462 with all matters that could possibly affect the amount of the premium, it would have been easier and less productive of misunderstanding to say that the Department was authorized to hear *all* premium disputes. Further, when the General Assembly expressly addressed "[c]omputation of premiums" and the need to refund "excessive" premiums paid as a result of the "application of incorrect classifications, payrolls[,] or any other factors of a rating system," it did so in a separate statute that had nothing to do with any proceeding by the Department. *See* 215 ILCS 5/462b (2020).

3. The Context In Which Section 462 Appears Further Demonstrates That It Authorizes the Department to Resolve Disputes About the Proper Interpretation of the Rules Only.

Third, the context of section 462 indicates that the Department's authority is limited to hearing disputes about interpretation of the rating organization's rules because it contraindicates in two ways the idea that the disputes covered by that section may raise issues of both fact and statutory interpretation. Section 462 makes an entity that lacks both power and experience relative to those issues the primary adjudicator of disputes within its scope, and another statute provides a forum in the circuit court for raising such issues.

First, section 462 gives a kind of "original jurisdiction" to the rating organization — here, the NCCI, acting through its sponsorship of the Board — by requiring it to hear the matter first. *See* 215 ILCS 5/462 (2020). The

Department has authority only to hear an "appeal," and is limited to "affirm[ing] or revers[ing]" the Board's decision. *Id.* This is significant because, while the Department has the authority to decide issues of fact and statutory interpretation in certain instances, *see, e.g.*, 215 ILCS 5/1018(B) (2020) (Cease and Desist Orders and Reports) (providing that "[i]f, after a hearing, the Director determines that the [entity] charged has not engaged in conduct or practices in violation of this Article, he shall prepare a written report which sets forth findings of fact and conclusions of law"), and thus has experience in handling such matters, the Board does not. Indeed, the Board itself conceded that it was ill equipped to resolve the factual and legal issues implicated in the parties' dispute. (*See* C 107).

Given the Board's relative disadvantage, it would be strange if the General Assembly had decided to make it, rather than the Department, the initial and primary adjudicator of disputes under section 462 — if those disputes were intended to extend to resolving factual questions and other questions beyond those about proper interpretation of the rules. On the other hand, if the disputes *are* confined to interpretation of the rules, it makes sense for the Board to make the initial determination, because the NCCI "facilitates" meetings for persons appointed to the Board and "serves as a nonvoting technical advisor regarding NCCI's manual rules." *See* https://www.ncci.com/Articles/pages/UW_disputeresolutionprocess.aspx?s=dispute#Q4 (last visited Feb. 16, 2022). Accordingly, raising the issue first before the Board allows the

determination to benefit from the NCCI's considerable expertise in interpreting its own rules.

It is no answer to say, as Liberty does (*see* AT Br. 16), that section 462 compensates for the Board's inability to handle questions raising issues of both fact and statutory interpretation by permitting the Department to act if the Board "fails to grant or reject such request within thirty days," *see* 215 ILCS 5/462 (2020). First, there is a more sensible explanation for the presence of that language — which is that it protects the insured from being denied appropriate relief because of the Board's delay or inaction. *See Fla. Welding & Erection Serv., Inc. v. Am. Mut. Ins. Co. of Boston*, 285 So. 2d 386, 389 (Fla. 1973) (characterizing similar language as "a safeguard favorable to the applicant to prevent delay in a decision, by the agency's indecision"). Second, relying on the Department to find facts and interpret the WCA does not remove the difficulty attending Liberty's interpretation of the statute. It would still be inefficient and even nonsensical to require all premium disputes to begin with the Board, if the Board was not intended to handle such matters.

Next, the statutory scheme does not require the Department to make findings of fact or reach conclusions on statutory interpretation in this context because section 462 is not designed to provide the parties, or even the insured, with full relief in connection with disputes over workers' compensation insurance premiums. Its only purpose is to enable the insured to obtain an informed and authoritative interpretation of the NCCI's rules. This may be

enough, as the NCCI website notes, to permit certain disputes to be resolved "without the need for litigation." *See* https://www.ncci.com/Articles/Pages/UW_disputeresolutionprocess.aspx (last visited Feb. 16, 2022). But where the dispute includes issues of fact or statutory interpretation instead of or in addition to issues involving interpretation of the rules, then those issues must be resolved by the courts.

Nothing in section 462 suggests that the General Assembly intended the Board or the Department to displace the circuit court as the primary factfinder and interpreter of statutes in insurance premium disputes. Had the General Assembly intended the Department to resolve all issues in dispute between insured and insurer over the amount of the premiums, as the Illinois Workers' Compensation Commission resolves all issues in dispute between employee and employer over workers' compensation claims, it would have so provided. *Cf.* 820 ILCS 305/18 (2020) ("All questions arising under this Act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the Commission."). It would also have provided for enforcement of the Department's decision in the circuit court. *Cf.* 820 ILCS 305/19(g) (2020) (providing for either party to seek entry of judgment in circuit court on decision of Commission). Instead, the General Assembly provided that, even when a dispute falls within the scope of section 462 because it concerns "application of incorrect classifications, payrolls[,] or any other factors of a rating system," *see* 215 ILCS 5/462b (2020), an insured who seeks a

refund of premiums based on an incorrect interpretation of those factors should seek relief in a separate action in the circuit court, *see id.*; *see also Cas. Ins. Co. v. Hill Mech. Grp.*, 323 Ill. App. 3d 1028, 1034-35 (1st Dist. 2001) (defining cause of action under section 462b).

There is no suggestion in either section 462 or section 462b that section 462b provides a concurrent remedy. And to the extent that any findings of fact or interpretations of statutes are necessary to provide the insured relief, they may be made by the circuit court in an action under section 462b.

In sum, the word "application" means "interpretation," especially in an administrative context where legal standards are being applied to particular facts; the words "aggrieved by" mean that the rules must not only have been applied in calculating the premium, but in the insured's view, wrongfully applied or misinterpreted; and the statutory context of section 462 further demonstrates that the General Assembly did not envision the Department making findings of fact and interpreting the WCA. Therefore, this Court should adopt the appellate court's holding that the Department's authority under section 462 is limited to resolving disputes about proper interpretation of the NCCI's rules.

C. Liberty's Arguments for Finding a Grant of Statutory Authority to Decide this Dispute in Section 462 Lack Merit.

In its opening brief before this Court, Liberty purports to be guided by *CAT Express* (*see* AT Br. 15-16, 18, 22), but seeks a different result. It argues

that this Court should find that the Department had statutory authority to resolve the parties' dispute because: (1) the dispute satisfied the requirements of section 462; (2) this case can be distinguished from *CAT Express* on the ground that the Board did not find that it lacked "jurisdiction"; and (3) this Court should follow an opinion issued by the Supreme Court of Idaho after this case was briefed in the appellate court, *see Travelers Ins. Co. v. Ultimate Logistics, LLC*, 467 P.3d 377 (Idaho 2020), that, in Liberty's view, shows that the language of section 462 permits the Department to consider issues of both fact and statutory interpretation. But none of those arguments has merit.

1. Liberty Fails to Call Into Question Whether the Dispute in This Case Was About "Application" of the NCCI's Rules.

Liberty attempts to frame the dispute in this case as "about the application" of the NCCI's rules by beginning its argument with a quotation from the language of Rule 2-H of the Basic Manual and by suggesting that application of the rules is at issue whenever there is a question as to whether premiums were "properly charged." (*See* AT Br. 14-15). But the argument, which Liberty fails to support with pertinent authority, lacks merit.

Liberty's argument on this point is limited to a pair of conclusory assertions and reference to a statement by Prate. Specifically, Liberty asserts that the Department's consideration of Prate's "'convoluted, and often contradictory arguments'" was "*precisely* what Section 462 envisions" *(id.* at 14) (emphasis added), and that the dispute over whether Liberty "properly

charged premiums for Prate's uninsured subcontractor" was "*clearly* a dispute about the application of the NCCI's manual rules" (*id.* at 15) (emphasis added). Relatedly, Liberty points to Prate's earlier characterization of the audit that led to the parties' dispute as based "primarily upon Rule 2-H." (*Id.* (citing C 451)). But Liberty does not explain why this dispute falls within section 462. And Prate's prior characterization of the dispute is immaterial because, as explained, *see supra* p. 12, questions of statutory interpretation are for courts, not interested parties, to resolve.

In addition, Liberty cannot justify its construction of section 462 based on the plain language of the statute and the broader context of the Code. As explained, *see supra* pp. 13-23, when the language of the statutory provision and the context of the Code are considered, it is clear that the Department's statutory authority is limited to disputes over the proper interpretation of the NCCI's rules.

Finally, Liberty does not argue in its opening brief that the Department had statutory authority to hear this dispute because the dispute raised a question about the proper interpretation of Rule 2-H or any other NCCI rule, and therefore Liberty has forfeited any such argument. *See BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23 (points not argued in appellant's brief are forfeited and cannot be raised in the reply brief or at oral argument). Moreover, such an argument would run contrary to a statement that Liberty did make in its opening brief. When discussing the applicable

standards of review, Liberty admitted that "[t]he important (indeed arguably dispositive) question" was whether ARW "'had employees that required coverage by Prate's policy or required some sort of certificate of insurance.'" (*See* AT Br. 13).

2. The Fact That the Board "Exercise[d] Jurisdiction" in This Case Is Irrelevant.

Liberty next argues that "how the Appeals Board acted" makes an "important distinction" between *CAT Express* and this case. (*See* AT Br. 16-18). It notes that in *CAT Express*, the Board did not hold a hearing and declined to take the case, stating that it lacked "jurisdiction" (*see id.* at 17 (citing *CAT Express*, 2019 IL App (1st) 181851, ¶ 5)), whereas in this case, the Board held a hearing and issued a formal decision (although it ultimately declined to rule because it lacked "'sufficient information'" to do so) (*see id.* (citing C 119-21)). But Liberty fails to explain why this matters.

Liberty cites no authority that justifies the importance that it is giving to the Board's choice of words, including its use of the word "jurisdiction," *see id.* at 17, and to its actions, including whether it purported to "exercise jurisdiction," *see id.* at 17-18. And the Department is not aware of any authority suggesting that the Board's opinion regarding the scope of the Department's statutory authority is either controlling or entitled to deference. What matters for purposes of establishing the Department's authority is what the relevant statutes say. *See Goral*, 2020 IL 125085, ¶ 33 (an agency derives its powers from its enabling act).

Moreover, to the extent that this Court is willing to consider the Board's opinion, it should note that in *CAT Express*, the Board explained that it lacked jurisdiction because "[c]overage or employment status disputes require an interpretation of the state or federal law and cannot be resolved by *interpretation or application* of NCCI rules," 2019 IL App (1st) 181851, ¶ 5 (emphasis added). Here, the principal matter in dispute is different, but it is equally true that the dispute cannot be resolved by interpretation or application of the NCCI's rules, as explained. *See supra* pp. 6-8 (noting that dispute turned on factual question regarding whether ARW had employees and on interpretation of the WCA). Therefore, the fact that the Board purported to "exercise jurisdiction" over the parties' dispute in this case is irrelevant.

3. The Supreme Court of Idaho's Decision in *Ultimate Logistics* Provides No Reason to Reverse the Appellate Court's Judgment in This Case.

Finally, Liberty contends that this Court should follow the Supreme Court of Idaho's decision in *Ultimate Logistics*. In that case, the Idaho court construed the word "application," in an Idaho statute that is analogous to section 462, to mean "use" of the relevant rules, such that review before the Idaho Workers' Compensation Appeals Board, an entity similar to the Board, and the Idaho Department of Insurance was triggered any time an insurer calculated a premium with reference to the rules. *See* 467 P.3d at 385. Liberty argues that *Ultimate Logistics* warrants a finding that the Illinois Department of Insurance has statutory authority to resolve its dispute with

Prate, because (1) the Idaho court was construing a provision of the Idaho Insurance Code that was "nearly identical" to section 462 (AT Br. 18, 20 (citing Idaho Code § 41-1622(2))); (2) that court was applying the "identical" NCCI rule, Rule 2-H (*id*. at 18); (3) there were factual issues in dispute, including the question whether a particular subcontractor had any employees (*see id*. at 19; *see also Ultimate Logistics*, 467 P.3d at 386-87); and (4) the case involved a challenge to the statutory authority of the Idaho Department of Insurance to hear the dispute (*see id*. at 18-19). But Liberty is mistaken.

To be sure, there are similarities between that case and this one. But, contrary to Liberty's contention (AT Br. 18), the Idaho court did not consider the "very same" arguments that are at issue here, and there are additional reasons why this Court should not find *Ultimate Logistics* compelling.

For starters, the challenge to the Idaho Department of Insurance's statutory authority rested on an argument that the Idaho Insurance Code "only grant[ed] the Department authority to determine 'whether a "filing" fails to meet the requirements of law.'" 467 P.3d at 385. The Idaho court thus was not asked to, and did not, address an argument that the Idaho Department of Insurance was limited to considering issues that require interpretation of the relevant rules.

Moreover, even if the Idaho court had addressed and rejected the same arguments on which the appellate court rested its analysis, this Court need not consider the views of its sister courts when those views are not "persuasive."

See Blumenthal v. Brewer, 2016 IL 118781, ¶ 82; *People v. Reyes*, 2020 IL App (2d) 170379, ¶ 63. And the decision in *Ultimate Logistics* is not persuasive for at least three reasons.

First, the Idaho court did not thoroughly consider the language and context of the statute that is the Idaho analog to section 462. While it claimed to be construing "the statute's plain language," *Ultimate Logistics*, 467 P.3d at 385, its conclusion that "[t]he phrase 'aggrieved by the application of its rating system' . . . plainly provides for the type of review that occurred in this case," *id.*, was almost as conclusory as Liberty's interpretation of section 462, *see supra* pp. 24-25. The Idaho court's only explanation of that conclusion was its further statement that: "When an insurer uses a rating organization's rating system to determine how much an insured must pay under the terms of its policy, the insurer is 'applying' the rating system." *Ultimate Logistics*, 467 P.3d at 385.

Second, the Idaho court's reasoning was erroneous. It concluded that any other interpretation of the phrase "aggrieved by the application of its rating system" would "read the words 'the application of' out of the statute altogether." *Id.* at 385. But as explained *supra* at pp. 16-17, this is not so: equating "application" with "interpretation" enables the term to designate a unique subset of disputes that are within the Board's particular expertise to resolve.

In addition, the Idaho court overlooked that its own interpretation of that phrase would render another of its terms meaningless. If "aggrieved by the application" of the rules means only that the rules have been used to calculate the final premium to which the insured objects, then the words "aggrieved by" have no limiting function. They are deprived of meaning because no premium is calculated without reference to the rules. The words are not necessary because *all* premium disputes will satisfy the requirement. *See supra* pp. 18-19.

Third, even if the decision in *Ultimate Logistics* accurately reflected the intent of the Idaho legislature, it cannot be said to reflect the intent of the Illinois General Assembly because the Idaho court's determination of intent relied in part on a statement of purpose in the Idaho Insurance Code that the Illinois Insurance Code does not contain. As the Idaho court noted, the Idaho Insurance Code states that a principal purpose of its chapter on Workers' Compensation Rates is to "provide for *review by the state* of such rate-making and *the results thereof*." 467 P.3d at 384 (citing Idaho Code § 41-1602(2)) (emphasis added).

The Illinois Insurance Code contains no analogous provision. Rather, its statement of purpose with respect to workers' compensation rates states only that the purpose is to "promote the public welfare by regulating workers' compensation and employer's liability insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, or erroneously

applied and to authorize and regulate cooperative action among companies in rate making and in other matters within the scope of this Article." 215 ILCS 5/454 (2020). Thus, if by providing for "review by the state" of the "results" of ratemaking, the Idaho legislature intended to authorize the Idaho Department of Insurance to review the ultimate results of ratemaking in the form of imposition of specific premium amounts, that is a purpose that the Illinois legislature apparently did not share.

In sum, the Idaho court in *Ultimate Logistics* did not consider the arguments presented here, and its analysis was therefore incomplete. It also reasoned erroneously about matters that it did consider. And its decision relied, at least in part, on a statement of legislative purpose that is not present in the Illinois Code. Therefore, *Ultimate Logistics* provides no reason to reverse the appellate court's judgment in this case.

In the final analysis, then, attention to the plain language and context of section 462 shows that the Department's statutory authority extends only to disputes about interpretation of the relevant rules and not to every issue that may arise concerning calculation of insurance premiums. And Liberty's arguments fail to call that conclusion into question. Accordingly, this Court should uphold the appellate court's judgment that the Department's decision is void and must be vacated.

CONCLUSION

For these reasons, Defendants-Appellees request that this Court affirm the appellate court's judgment vacating the Department's final order and vacating the portion of the circuit court's judgment that affirmed that order.

Respectfully submitted,

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February 16, 2022

SUPPLEMENTARY APPENDIX

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 215. Insurance (Refs & Annos)
Act 5. Illinois Insurance Code (Refs & Annos)
Article XXIX. Workers' Compensation and Employers' Liability Rates (Refs & Annos)

215 ILCS 5/462b
Formerly cited as IL ST CH 73 ¶ 1065.9b

5/462b. Computation of premiums

Currentness

§ 462b. Insurance companies shall apply correct classifications, payrolls and other factors of a rating system to compute premiums. If the application of incorrect classifications, payrolls or any other factors of a rating system results in the payment by an insured of premiums in excess of the premiums that would have been paid utilizing the correct applications of classifications, payrolls or other factors of a rating system, the insurer shall refund to the insured the excessive premium paid for the period during which the incorrect application of classifications, payrolls or other factors of a rating system were applied. This Section is intended to codify existing law and practice.

Credits
Laws 1937, p. 696, § 462b, added by P.A. 83-1002, § 1, eff. Jan. 1, 1984.

Formerly Ill.Rev.Stat.1991, ch. 73, ¶ 1065.9b.

Notes of Decisions (3)

215 I.L.C.S. 5/462b, IL ST CH 215 § 5/462b
Current through P.A. 102-691 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

Basic Manual Rule 2-H. Subcontractors

1. In those states where workers compensation laws provide that a contractor is responsible for the payment of compensation benefits to employees of its uninsured subcontractors, the contractor must furnish satisfactory evidence that the subcontractor has workers compensation insurance in force covering the work performed for the contractor. The following documents may be used to provide satisfactory evidence:

   - Certificate of insurance for the subcontractor's workers compensation policy
   - Certificate of exemption
   - Copy of the subcontractor's workers compensation policy

2. For each subcontractor not providing such evidence of workers compensation insurance, additional premium must be charged on the contractor's policy for the uninsured subcontractor's employees according to Subcontractor Table 1 and 2 below.

Subcontractor Table 1

(Exceptions: FL, TN)

If the contractor has not furnished evidence of workers compensation insurance and . . .	Then to calculate the additional premium . . .
Furnishes complete payroll records of the subcontractor's employees . . .	Use the payroll detailed in the records
Does not furnish complete payroll records and the subcontract price does not reflect a definite payroll amount . . .	Use the full subcontract price of the work performed during the policy period by the subcontractor as payroll
Does not furnish complete payroll records, but documentation of a specific job discloses that a definite amount of the subcontract price represents payroll . . .	Use the payroll amount indicated by the documentation as the payroll, subject to the minimums in Subcontractor Table 2 below

Subcontractor Table 2

(Exceptions: FL, TN)

If the job involves:	Then the minimum to calculate additional premium is:
Mobile equipment with operators (such as but not limited to earth movers, graders, bulldozers, or log skidders)	Not less than 33 1/3% of the subcontract price

Labor and material	Not less than 50% of the subcontract price
Labor only	Not less than 90% of the subcontract price
Piecework	Not less than 100% of the subcontract price (The entire amount paid to pieceworkers must be the payroll.)

West's Idaho Code Annotated
Title 41. Insurance (Refs & Annos)
Chapter 16. Worker's Compensation Rates (Refs & Annos)

I.C. § 41-1622

§ 41-1622. Information to insureds--Review of insured's complaint

Currentness

(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.

Credits
S.L. 1969, ch. 306, § 22; S.L. 2005, ch. 77, § 21.

Notes of Decisions (4)

I.C. § 41-1622, ID ST § 41-1622
Statutes and Constitution are current with Chapters 1 to 364 and S.J.R. No. 102 of the 2021 First Regular Session of the 66th Idaho Legislature, which convened on Monday, January 11, 2021.

End of Document

SA 4

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 16, 2022, I electronically filed the foregoing **Brief and Supplementary Appendix of Defendants-Appellees** with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this case, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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