No. 127140

IN THE
SUPREME COURT OF ILLINOIS

PRATE ROOFING AND INSTALLATIONS, LLC,	)	
Plaintiff-Appellee,	)	Appellate Court, First Judicial District, Case No. 1-19-1842
-vs-	)	
LIBERTY MUTUAL INSURANCE CORPORATION	)	Circuit Court, Cook County, Illinois Case No. 18-CH-9826
Defendant-Appellant,	)	Honorable Caroline Kate Moreland Judge Presiding
and	)	
THE ILLINOIS DEPARTMENT OF INSURANCE; ROBERT H. MURIEL, in his capacity as Director; and PATRICK RILEY, in his capacity as Hearing Officer	)	
Defendants-Appellees.	)	

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT LIBERTY MUTUAL INSURANCE CORPORATION

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NATURE OF THE CASE

This is an appeal from an Order of the Appellate Court, First District, which vacated a final administrative decision made by the Director of the Illinois Department of Insurance.

Plaintiff-Appellee, Prate Roofing & Installations, LLC ("Prate") was insured under a statutory Illinois workers' compensation insurance policy issued by Defendant-Appellant, Liberty Mutual Insurance Corporation ("Liberty Mutual"). (C 205; C 253-295).

In workers' compensation insurance, a payroll audit is done to determine premiums owed for coverage provided. (C 205). In Illinois, when construction related activity is involved, NCCI Basic Manual Rule 2-H requires the insurer to include in the premium audit all payments made by the insured to any uninsured subcontractor. (C 385-386).

Liberty Mutual determined that an entity called ARW Roofing, LLC was an uninsured subcontractor who was paid by Prate. (C 19). Liberty Mutual therefore included in Prate's audit the payments Prate made to ARW Roofing, LLC.

Prate disputed Liberty Mutual's decision. Pursuant to 215 ILCS 5/462, Prate's dispute was heard by the Illinois Department of Insurance ("the Department").

In May of 2018, the Department issued an Order finding that Liberty Mutual properly applied NCCI Manual Rule 2-H, and upheld Liberty Mutual's premium audit. (C 15-26). Prate filed a Motion for Rehearing or Reopening of Hearing, which was denied. (C 27-30).

Prate next filed a Petition for Administrative Review with the Circuit Court of Cook County. Prate's Petition contained two counts, being: "Count I - Administrative Review" and "Count II - Declaratory Judgment." (C 11-14).

Regarding "Count II - Declaratory Judgment" on December 12, 2018, the Circuit Court dismissed same as procedurally improper. (C 81).

Regarding "Count I - Administrative Review" on August 4, 2019 (following briefing and a hearing) the Circuit Court affirmed the decision of the Department. (C 660; R 1-10).

Prate next filed an appeal with the Illinois Appellate Court, First District.

On March 5, 2021, the Appellate Court of Illinois, First District, vacated both the Department's Order of May 7, 2018 and the Circuit Court's Order of August 14, 2019. (A 1-24).

On April 8, 2021, Liberty Mutual filed a Petition for Leave to Appeal Pursuant to Supreme Court Rule 315.

On September 29, 2021, the Illinois Supreme Court allowed the Petition for Leave to Appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the Department had jurisdiction to hear the dispute between Prate and Liberty Mutual pursuant to 215 ILCS 5/462.
2. Whether this Court should affirm the Department's Order that Liberty Mutual was "entitled to the premium charges assessed to Prate Roofing regarding workers compensation policy number WC5-34S-540426-024."

STATEMENT OF FACTS

Prate is a roofing and construction contractor operating in the State of Illinois. (C 18).

Prate's sole LLC member is Ms. Cynthia Rossetti. (C 367). Ms. Rossetti is also Prate's President. (C 21).

In this litigation, Mr. Michael Prate described himself as a "former agent" and "current employee" of Prate. (C 18). Outside of this litigation, Mr. Prate held himself out as a leader of Prate, stating on the company's website, "In May of 2013, Michael [Prate] legally shut down all union work and went back to doing old market retro work. Prate Roofing & Installations, LLC was formed and is a non-union company. Michael's knowledge and experience has led this company to what it is today." (C 420).

In 2013, Prate sought workers' compensation insurance coverage through the Illinois Assigned Risk Plan. (C 204; C 220-251). Liberty Mutual was randomly assigned (by the Administrator of the Assigned Risk Plan) as the insurance carrier, and provided coverage effective October 18, 2013. (C 204; C 220).

In 2014, Liberty Mutual issued to Prate renewal policy #WC5-34S-540426-024 (the "Policy") with coverage effective October 18, 2014. (C 205; C 271).

In workers' compensation insurance, audits are conducted in order to determine the payroll exposure from which the premiums owed are derived. (C 205). Amongst other matters, premium audits establish whether an insured (such as Prate) has provided workers' compensation certificates of insurance for all of its subcontractors. (C 19).

The Policy issued to Prate was subject to a "Self Audit," (C 19) and Prate provided Liberty Mutual with documents for the audit. (C 205; C 296-341).

During the Policy period, Prate had contracted with several subcontracting entities. (C 20). As part of its Self Audit, Prate represented that it had provided certificates of workers' compensation insurance coverage for all of these subcontractors. (C 206).

Lisa Murphy was the Liberty Mutual auditor assigned to Prate. (C 19).

Ms. Murphy reviewed Prate's Self Audit documents and discovered that Prate had been paying various subcontractors – including subcontractor ARW Roofing (i.e., ARW Roofing, LLC) and another subcontractor named Reliable Trade Services, Inc. ("RTS"). (C 19; C 206).

RTS was owned by a Mr. Michael Gurdak (C 406). RTS payroll was excluded from Prate's audit because RTS had a valid certificate of insurance. (C 209).

In addition to RTS, Mr. Michael Gurdak also owned ARW Roofing, Inc. ("ARW Inc."). (C 406). According to Prate, ARW Inc. underwent a "name change" to RTS. (C 19).

Thus, entities relevant to this litigation (in addition to Prate and Liberty Mutual) include uninsured subcontractor ARW Roofing and insured subcontractors RTS and ARW, Inc.

As referenced above, Liberty Mutual's auditor discovered that while Prate had produced a certificate of workers' compensation insurance for RTS, it had not presented one for ARW Roofing. (C 19).

ARW Roofing did have certain lines of insurance (e.g., commercial general liability and automobile liability), but it did not have workers' compensation insurance coverage – as that was provided to "Reliable Trade Serv Only." (C 206; C 332).

The LLC manager of ARW Roofing is an entity called Emmolly Corporation, Inc. (C 19). In discovery, Prate stated that Mr. Michael Prate was the "Owner/Director" of Emmolly Corporation and that Ms. Cynthia Rossetti was the president of the company. (C 367).

In a subsequent affidavit, Mr. Prate stated that he (not Ms. Rossetti) was the president of Emmolly Corporation. (C 19). In short, Michael Prate and/or Cynthia Rosetti formed Emmolly Corporation, which was the LLC manager of the uninsured subcontractor at issue in this case (i.e., ARW Roofing, LLC).

The Department noted that affidavits submitted by Prate provided "contradictory evidence concerning ownership" of the various companies. (C 21).

Because ARW Roofing was an uninsured subcontractor, Liberty Mutual's auditor determined that its payroll exposure must be included in Prate's premium calculation per Basic Manual Rule 2-H Subcontractors. (C 19; C 349-352).

Basic Manual Rule 2-H Subcontractors provides (in part) as follows:

> 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.

(C 208; C 385-386).

Further, Rule 2-H Table 1 and Table 2 provide (in part) that "if the contractor has not furnished evidence of workers compensation insurance," and the job involves "labor only," then the "minimum to calculate additional premium is...Not less than 90% of the subcontract price." (C 385-386).

Liberty Mutual's auditor explained the self audit results as follows:

> Satisfactory evidence of coverage was not provided, therefore, Liberty referred to handling as instructed by Rule 2-H Table 1 and Table 2. Liberty had made multiple attempts to work with Prate in determining appropriate audit handling, to no avail. Since neither Prate nor ARW provided any invoices to allow us to determine the jobs involved, cost breakdowns, or the timeframe for the jobs in which payment is in question; the audit was completed with the information available. Accordingly, the total included within the audit was 90% of total paid to ARW.

(C 351).

The payments made by Prate to ARW Roofing totaled $300,673.56 – of which 10% was excluded for materials – resulting in a total of $270,606.20 being added to Prate's audited payroll exposure. (C 209).

Prate disputed Liberty Mutual's determination, and sought administrative relief before the Illinois Workers Compensation Appeals Board (the "Appeals Board"). The Appeals Board held a hearing on Prate's dispute and in June of 2016, the Appeals Board issued its "Case Summary & Decision." (C 119-121).

In its Case Summary & Decision, the Appeals Board determined that it did not "have sufficient information to rule on this dispute" because Prate had not provided coverage information for either of its subcontractors. (C 120). Specifically, the Appeals Board stated, "there were no policy declaration forms for either ARW or RTS provided during the meeting. The Board could not confirm or refute whether coverage existed for these entities.

Further, the Board could not determine whether the legal status issue of ARW being an LLC or an Inc. when the work was performed had a bearing on this dispute." (C 120).

The Appeals Board notified Prate of its Right to Appeal, and Prate subsequently appealed the decision to the Department. (C 120 and C 105). The Department issued a "Notice of Hearing" pursuant to Sections 401, 402, 403 and 462 of the Illinois Insurance Code. (C 102-104).

Whereas the Appeals Board was unable to get from Prate "sufficient information to rule on this dispute," the Department (by authorizing discovery per 50 Ill. Admin. Code 2402.170) did enable the parties to obtain sufficient information for resolution of this case. (See e.g., C 365-372).

Whereas the Appeals Board was unable to determine whether the so-called "name change" from ARW to RTS implicated ARW Roofing, LLC or ARW Roofing Inc. (C 120), the Department was able to determine that it was ARW Roofing Inc. (and not the uninsured subcontractor ARW Roofing, LLC) that underwent the so-called "name change" to RTS. (C 19).

Whereas the Appeals Board was not presented with "policy declaration forms for either ARW or RTS" in order to "confirm or refute whether coverage existed for these entities," (C 120), the Department was able to find that it was "undisputed" that ARW Roofing "did not have a worker's compensation insurance policy of its own during Prate Roofing's policy period." (C 20). The Department further found that, "the evidence shows that RTS and ARW LLC [i.e., the subcontractor at issue] were separate and distinct entities during the period in question." (C 24).

Based upon her review and examination of audit and discovery documents, Liberty Mutual's auditor testified (via her detailed affidavit) that there was no clear indication that the payroll exposure from ARW Roofing's employees was either reported or paid for elsewhere – or that any other workers' compensation insurance coverage was available to them. (C 209-210).

As stated by Ms. Murphy in her affidavit:

> ...invoices were issued that did not match the hours worked on the payroll summaries or the crew weekly time sheets. In addition, the amounts paid by Prate Roofing did not always correlate to invoices issued by RTS or ARW Roofing – and to further complicate things Prate Roofing was issuing invoices to both RTS and ARW Roofing. The audit completed by American Interstate Insurance Company (RTS's insurance company) does not identify any wages for ARW Roofing as it did in the past – nor does it provide any reference to what happened with these wages.

(C 210).

During discovery, Liberty Mutual served interrogatories on Prate toward obtaining any factual support for Prate's contentions regarding the relationship between ARW Roofing and RTS. (C 22). Prate responded as follows:

> **18.** In 2014 and 2015, please set forth all audit exposure payroll details disclosed by Reliable Trade Services, Inc. to its workers' compensation insurance carrier regarding work performed for Prate.
>
> **ANSWER**: Unknown.
>
> **19.** In 2014 and 2015, please identify any and all payments from ARW Roofing, LLC to Reliable Trade Services, Inc.
>
> **ANSWER**: Unknown

> **20.** What did ARW Roofing, LLC do with the payments it received from Prate in 2014 and 2015? Did it transfer same to Reliable Trade Services in full or in part. Specifically, how much?
>
> **ANSWER**: Unknown.

(C 372).

In reviewing Prate's responses, the Department found it "dubious that no information could have been provided to Liberty Mutual through these interrogatories to substantiate that ARW LLC had no employees." (C 22).

Following discovery, Prate and Liberty Mutual "waived their right to an in-person hearing and requested issues be determined by written submissions and exhibits." (C 17). In March of 2018, the Department issued its: Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer ("Findings of Facts").

In its Finding of Facts, the Department's Hearing Officer noted:

> At issue is whether Liberty Mutual justifiably assessed Prate Roofing an additional premium for its use of services by ARW LLC, which it deemed an uninsured contractor.

(C 20).

In its Finding of Facts, the Department reviewed the applicable law and the applicable rules (including NCCI Manual Rule 2-H) in determining that, "Liberty Mutual properly chose to utilize the payments Prate Roofing had made to ARW LLC for work performed by the latter for the purpose of determining Prate Roofing's premium due under Liberty Mutual workers compensation policy number WC5-34S-540426-024." (C 25).

In its Finding of Facts, the Hearing Officer concluded that:

> As previously stated, Prate Roofing was contractually bound to the Plan rules administered by the NCCI, which included the Basic Manual. Accordingly,

> Liberty Mutual permissibly used $270,606.20 – 90% of the total subcontract price between ARW LLC and Prate Roofing – as the estimated payroll for ARW LLC employees to serve as the basis for calculating the additional premium owed by Prate Roofing.

(C 24).

The Hearing Officer's analysis comported with the language of NCCI Basic Manual Rule 2-H (i.e., using "not less than 90% of the subcontract price" for uninsured subcontractors). (C 385-386).

In May of 2018, the Director of the Department adopted the Hearing Officer's Findings of Facts (C 15-16) and ordered that Liberty Mutual was "entitled to the premium charges" it assessed to Prate. (C 16).

Prate subsequently filed a Motion for Rehearing or Reopening of Hearing. (C 569-573).

In response, the Department noted that Prate had submitted a "convoluted, and often contradictory picture of [its] dealings with its subcontractors RTS and ARW LLC" and that Prate had "offered no evidence, beyond conclusory statements, for these discrepancies." (C 28).

In denying Prate's Motion, the Department further stated that:

> Prate Roofing has not refuted that it was subject to the NCCI's Basic Manual for workers compensation coverage. Prate Roofing has offered no evidence contradicting the assertion that Liberty calculated the additional premium according to Tables 1 and 2 of Rule 2-H of the NCCI's Basic Manual, which was the contract price for ARW LLC's services and materials for Prate Roofing.

(C 29).

In August of 2018, Prate filed a Petition for Administrative Review in the Circuit Court of Cook County. (C 11-14).

Prate's Petition contained two counts, being: "Count I - Administrative Review" and "Count II - Declaratory Judgment." (C 11-14).

The Department filed a Motion to Dismiss Count II pursuant to 735 ILCS 5/2-615. (C 48-50). Liberty Mutual joined the Department's Motion to Dismiss. (C 71-77). The Circuit Court held a Hearing on the Motion to Dismiss on December 12, 2018, and ruled "Count II (declaratory judgment) is dismissed as procedurally improper without prejudice." (C 81).

On August 14, 2019, following legal briefing and oral argument, the Circuit Court ruled that "The Orders entered by the Illinois Department of Insurance on 5/7/18 and 6/7/18 are affirmed for the reasons stated in the record." (C 660; see also R 1-10).

On September 10, 2019, Prate filed its Notice of Appeal with the Appellate Court of Illinois, First District. (C 662-663).

In its Administrative Brief (and its Appellate Brief), Prate acknowledged that ARW Roofing was an "uninsured subcontractor" of Prate. (C 609).

On March 5, 2021, the First District vacated both the Department's Order of May 7, 2018 and the Circuit Court's Order of August 14, 2019. (A 1-24).

STANDARD OF REVIEW

"The proper standard of review in cases involving administrative review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact

and law." *Beggs v. Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186*, 2016 IL 120236, ¶50.

There are two questions presented in this case. First, did the Department have jurisdiction to decide this case? Second, assuming that jurisdiction was present, should the Appellate Court have affirmed the Department's (and the Circuit Court's) decisions?

Those two questions are subject to different standards of review, as follows:

A. Review of the Appellate Court's Jurisdictional Ruling

In reviewing the Appellate Court's decision to vacate the Department's Order, the standard of review is *de novo* because the issue is a question of law.

As this Court has previously stated, "Whether the appellate court has jurisdiction to consider an appeal presents a question of law which we review *de novo*." *Bd. of Educ. of Roxana Cmty. Sch. Dist. No. 1 v. Pollution Control Bd.*, 2013 IL 115473, ¶17.

Furthermore, resolution of the jurisdictional question turns solely on the construction of a statue – in this case 215 ILCS 5/462. As "statutory construction is likewise a question of law," *de novo* review is appropriate. See *Ill. State Treasurer v. Ill. Workers' Comp. Comm'n*, 2015 IL 117418, ¶14.

B. Review of the Department's Ruling on the Merits

As a matter of sound law and public policy, Illinois Courts have "frequently acknowledged the wisdom of judicial deference to an agency's experience and expertise." *AFM Messenger Serv. v. Dep't of Empl. Sec.*, 198 Ill. 2d 380, 394 (2001). Further, "The applicable standard of review, which determines the degree of deference given to the agency's decision, depends upon whether the question presented is one of fact, one of law,

or a mixed question of law and fact." *Id*., at 390. In this case (as noted by the Circuit Court) different standards will be applied to different issues as set forth below. (R 1-10).

1. Manifest Weight of the Evidence Standard

The important (indeed arguably dispositive) question of whether ARW Roofing "had employees that required coverage by Prate's policy or required some sort of certificate of insurance" is a question of fact. (R 6). On factual questions, "a reviewing court does not weigh the evidence or substitute its judgment for that of an administrative agency. Instead, a reviewing court is limited to ascertaining whether such findings of fact are against the manifest weight of the evidence." *City of Belvidere v. Ill. State Labor Rels. Bd.*, 181 Ill. 2d 191, 204 (1998). This is a very high and deferential standard.

2. Clearly Erroneous Standard

On the other hand, the question of "whether or not the arrangements between Prate and ARW exposed Liberty to liability, and therefore, subjected Prate to the increased premium" is a mixed question of law and fact. (R 6-7). Similarly,"whether or not the calculation of the premium was erroneous" also requires the application of "facts to law." (R 7).

The standard of review for mixed questions of law and fact are "significantly deferential." *AFM Messenger*, 198 Ill. 2d at 392. Mixed questions involve "an examination of the legal effect of a given set of facts," and on such questions, courts apply the "clearly erroneous" standard. *Id*., at 391-392. Thus, this Court has stated, "We will reverse only if, after review of the entire record, we are 'left with the definite and firm conviction that a mistake has been committed.'" *Carpetland U.S.A. v. Ill. Dep't of Empl. Sec.*, 201 Ill. 2d 351,

369 (2002), quoting *AFM Messenger*, 198 Ill. 2d at 395. As stated by the Supreme Court, "Review for clear error is significantly deferential to an agency's experience in construing and applying the statute that it administers." *Bd. of Educ. of Chi. v. Ill. Educ. Labor Rels. Bd.*, 2015 IL 118043, ¶18.

ARGUMENT

I. THE DEPARTMENT HAS JURISDICTION OVER THIS MATTER PURSUANT TO 215 ILCS 5/462

During the Policy period, Prate made various payments to the uninsured subcontractor ARW Roofing. That fact is undisputed. Per Rule 2-H of the Basic Manual, "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..." (C 208 at ¶22). Liberty Mutual applied Basic Manual Rule 2-H and charged the required premiums. Prate contested same – and ultimately argued that although it had paid ARW Roofing, the work was actually done by a different company.

The Department heard Prate's "convoluted, and often contradictory" arguments and rejected same based on the evidence. This is precisely what Section 462 envisions. Both the Department's jurisdiction (under Section 462) and the Department empowerment for adjudicating the matter (under Section 401) cannot be squared with the Appellate Court's decision in error. By coincidence, the Supreme Court of Idaho, on a set of law and facts remarkably similar to the matter *sub judice*, recently issued an opinion correct in its reasoning and in the application of legislative statutory intent to an administrative agency's jurisdiction.

A. The Department had Jurisdiction over this Matter Pursuant to Section 462 of the Illinois Insurance Code

As stated by the Department, "At issue is whether Liberty Mutual justifiably assessed Prate Roofing an additional premium for use of services by ARW LLC, which it deemed an uninsured contractor." (C 20). That question – whether Liberty Mutual properly charged premiums for Prate's uninsured subcontractor – is clearly a dispute about the application of the NCCI's manual rules (specifically Basic Manual Rule 2-H). As stated by Prate, "Liberty's audit relies primarily upon Rule 2-H of the NCCI Basic Manual." (C 451).

The Illinois Insurance Code, at Section 462, provides a mechanism for insureds to dispute certain matters relating to their workers' compensation insurance policy. In particular, the Insurance Code provides, in part, as follows:

> 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.

As explained by the Appellate Court in *CAT Express, Inc. v. Muriel*, "section 462 requires a rating agency, like the NCCI, to provide insureds...with information regarding any NCCI rate affecting an insured. If [the insured] was aggrieved by the NCCI's rating system, [the insured] could request the NCCI to review the applied rating system under section 462,

and if the NCCI review was adverse to [the insured], it could then appeal to the Department." *CAT Express, Inc. v. Muriel*, 2019 IL App (1st) 181851, ¶27.

In conformity with the above, Prate exercised its administrative remedies and brought its dispute to the Illinois Workers' Compensation Appeals Board (which is administered by the NCCI).

The Appeals Board held a hearing on Prate's dispute, but determined that it did not "have sufficient information to rule on this dispute" because Prate had not provided coverage information for either of its subcontractors. Specifically, the Appeals Board stated, "there were no policy declaration forms for either ARW or RTS provided during the meeting. The Board could not confirm or refute whether coverage existed for these entities. Further, the Board could not determine whether the legal status issue of ARW being an LLC or an Inc. when the work was performed had a bearing on this dispute." (C 119-121).

By its plain language, Section 462 of the Insurance Code specifically takes into account the possibility that the rating organization (i.e., the NCCI) might fail "to grant or reject" an insured's requested relief (as was the case here). When that happens, "the applicant may proceed in the same manner as if his application had been rejected." 215 ILCS 5/462. In particular, Prate was allowed to "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." *Id*.

It is worth noting the important distinction between how the Appeals Board acted in the present case compared with how it acted in the *CAT Express* case.

In *CAT Express*, where the legal issue was about whether truck drivers were employees or independent contractors, the Appeals Board did not hold a hearing – or even attempt to resolve the dispute. Rather, the NCCI sent a letter to the insured advising that the Appeals Board lacked jurisdiction because the NCCI (i.e., the Appeals Board) only had jurisdiction to resolve matters, "relating to the interpretation or application of the following NCCI rules: 1) Experience Rating Plan, 2) Classification system, and 3) Manual Rules." *CAT Express*, 2019 IL App (1st) 181851 at ¶5.

In contrast, in the present case the Appeals Board recognized that there was jurisdiction to resolve Prate's dispute (concerning the application of an NCCI manual rule). Indeed, the Appeals Board actually held a hearing on this matter and issued a formal "Case Summary & Decision." (C 119-121). The Appeals Board's finding (after conducting a hearing) that it did "not have sufficient information to rule on this dispute" is fundamentally different from the Appeals Board's letter in *CAT Express* (where it told the insured it did not have jurisdiction to hear the dispute).

The chain of events in this case – starting with Prate's submission of a manual rule dispute to the Appeals Board, followed by the Appeals Board's decision to exercise jurisdiction and hold a hearing, and culminating in an appeal to the Department – conferred jurisdiction on the Department pursuant to Section 462.

In essence, Prate raised an affirmative defense to the application of Basic Manual Rule 2-H (by claiming the uninsured subcontractor that it paid didn't actually have any workers). This defense was ultimately rejected by the Department. However, the mere raising of this affirmative defense by Prate did not (and does not) divest the Department of

its jurisdiction – which is derived from the legislative scheme promulgated under Section 462.

Accordingly, because this case concerned a dispute about the application of an NCCI manual rule (i.e., Basic Manual Rule 2-H) the Illinois Workers Compensation Appeals Board had – and correctly exercised – its jurisdiction to hear this case. (C 119-121). When the Appeals Board failed "to grant or reject" the relief sought by Prate (an outcome envisioned in the Insurance Code), the case was properly appealed to the Department pursuant to 215 ILCS 5/462. This view of jurisdiction comports with the Appellate Court's finding in *CAT Express*, i.e., that Section 462 grants jurisdiction to the Department in matters concerning, "the application of an experience rating plan, a classification system, or any NCCI manual rules." *CAT Express*, at ¶31.

B. The Supreme Court of Idaho has Considered the Exact Same Issue – and Found the Idaho Department of Insurance Does Have Jurisdiction

While the present case was pending on appeal (but after briefing had been concluded), the Supreme Court of Idaho heard and decided a case involving the very same jurisdictional arguments at issue here. The Supreme Court of Idaho applied the identical NCCI Manual Rule (i.e., Basic Manual Rule 2-H) to a nearly identical portion of the Insurance Code – and found that jurisdiction was properly conferred on the Idaho Department of Insurance ("Idaho Department"). See *Travelers Insurance Co. v. Ultimate Logistics, LLC*, 467 P.3d 377 (2020). The Idaho Supreme Court's decision is the correct analysis of the relevant law, and same should be followed in this case.

In the *Travelers* case, the Idaho Supreme Court was presented with a fact pattern that is strikingly similar to the one at issue here. The insured disputed its insurer's classification

code selection and the application of NCCI Basic Manual Rule 2-H. Like the present case, the insured first brought its dispute to the NCCI and the Idaho Workers' Compensation Appeals Board. *Id*. at 380-381. The Idaho Appeals Board held a hearing on the matter but declined to rule on the insured's Rule 2-H dispute. It then advised the insured of its right to appeal to the Idaho Department. *Id*.

The Idaho Department exercised jurisdiction over the dispute and found that the insurer improperly applied Basic Manual Rule 2-H. *Id*., at 381. In particular, the Department's Hearing Officer resolved a factual question and found "There is no evidence that either of the mechanics have [sic] any employees." *Id*., at 383. This specific factual finding resulted in a legal conclusion that NCCI Manual Rule 2-H could not apply – as the rule specifically states that "additional premium must be charged on the contractor's policy for the uninsured subcontractor's employees." (C 385-386, emphasis added).[1]

The Insurer in the *Travelers* case sought judicial review. In the administrative review action the Idaho District Court stated that "the dispositive question on appeal was 'whether the [Department] has the statutory authority to determine the proper application of NCCI Basic Manual Rule 2.'" *Id*., at 381. The District Court found that "the Department had such authority" and "affirmed the Director's final order." *Id*., at 382.

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1 In the present case, the Department reviewed the relevant evidence and specifically found that Prate's uninsured subcontractor did have employees. In particular, the Department found "based on the records of workers compensation payments from RTS to ARW LLC and the lack of reliable evidence indicating that these payments were not intended to cover employees actually employed by ARW LLC, the Hearing Officer finds that ARW LLC had employees during the policy period at issue." (C 22, emphasis added).

On appeal to the Supreme Court of Idaho, the insurer again argued that the Idaho Department acted outside the scope of its statutory authority when deciding that certain payroll "could not be included in the premium-rate calculation 'by virtue of NCCI Basic Manual Rule 2.H.2.'" *Id.*, at 383. In looking at this issue, the Court noted that "answering the question of whether the mechanics are employees or independent contractors is not necessary to the disposition of this case...the Department was interpreting NCCI's Basic Manual Rule 2.H and reviewing Travelers application thereof." *Id*.

Just like in Illinois, the Idaho Department is an administrative agency with "limited jurisdiction" that has "no authority outside of what the Legislature specifically grants to them." *Id*. at 384. Thus, to answer the question of the Idaho Department's statutory authority, the Idaho Supreme Court looked to the Idaho Insurance Code.

To begin its analysis, the Court in *Travelers* looked to Idaho Code Section 41-1622 (which is virtually identical to Section 462 of the Illinois Insurance Code). Both States' Insurance Codes speak to the fact that "every rating organization" shall provide "reasonable means whereby any person aggrieved by the application of its rating system may be heard." Furthermore, both States' Insurance Codes provide for an appeal to the State's Department of Insurance for "any party affected by the action of such rating organization" – this includes the situation where the rating organization "fails to grant or reject" the relief sought. *Compare* 215 ILCS 5/462 with I.C. § 41-1622(2).

The *Travelers* Court looked at the relevant portion of the Insurance Code and interpreted same as follows:

> The phrase "aggrieved by the application of its rating system" in Idaho Code section 41-1622(2) plainly provides for the type of review that occurred in

> this case. 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. The statute expressly provides for review of "the manner in which such rating system has been applied in connection with the insurance afforded . . . ." I.C. § 41-1622(2). Based on the statute's plain language, we can only conclude that Idaho Code section 41-1622(2) provides for review of an insurer's application of a rating system to an insured's policy. To hold otherwise would be to read the words "the application of" out of the statute altogether.

Travelers, 467 P.3d at 385.

Having determined that the Insurance Code allowed the Idaho Department to rule on disputes about the application of a rating system, the next question for the *Travelers* Court was whether application of NCCI Basic Manual Rule 2-H was part of a "rating system." *Id*. On this point the Court again looked to portions of the Idaho Insurance Code which are strikingly similar to the Illinois Insurance Code.

In particular, the *Travelers* Court looked to I.C. § 41-1606 which speaks to "rate filings." *Id*., at 385. This portion of the Insurance Code states that "rate filings" include "every manual of classifications, rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use." See I.C. § 41-1606. Likewise, the Illinois Insurance Code's section on "rate filings" similarly speaks to "every manual of classifications, every manual of rules and rates, every rating plan and every modification of the foregoing which it intends to use." See 215 ILCS 5/457.

With the above in mind, the *Travelers* Court stated as follows:

> NCCI's Basic Manual Rule 2.H is part of a rating system promulgated by NCCI and used by insurance companies in Idaho to write and administer workers' compensation policies. As such, Basic Manual Rule 2.H is a "rate filing" as described in section 41-1606 and subject to review under sections 41-1622 and 41-1623 of the Insurance Code. Travelers "applied" NCCI's Basic Manual Rule 2.H to determine whether two mechanics, treated as

> uninsured subcontractors, could be included in the premium-rate calculation. That calculation had a direct impact on Ultimate's workers' compensation policy because it was used to determine the premium rates Ultimate would be charged. Since aggrieved insureds have a right to review "the application of" a rating system in connection with their insurance policy, Ultimate rightfully sought review of Travelers' "application of" Rule 2.H to its insurance policy. Therefore, the district court did not err in determining that the Department acted within its statutory authority under sections 41-1622 and 41-1623 of the Insurance Code when it reviewed "the application of" NCCI's Basic Manual Rule 2.H to Ultimate's insurance policy.

Travelers, 467 P.3d at 385.

The Idaho Supreme Court's analysis comports with the Illinois Appellate Court's decision in *CAT Express*. Both cases reached the decision that disputes about the application of NCCI Basic Manual rules are within the jurisdiction of their respective Department of Insurance. As stated by the Illinois Appellate Court, Section 462 grants (and limits) the Department's review to the "interpretation or application of [NCCI's] experience rating plans, its classification system, or its manual rules." *CAT Express, Inc. v. Muriel*, 2019 IL App (1st) 181851, ¶31.

Notwithstanding that rule, the Appellate Court herein concluded that this case could not be considered "as simply an analysis of the NCCI's Basic Manual Rule 2-H" because "there must be findings of fact and conclusions of law made to establish ARW LLC's status as an employer and if so, whether any of its employees completed work on Prate's projects." (A 21, ¶58). The Idaho Supreme Court's analysis shows the error of that reasoning. In *Travelers*, just like the present case, it was necessary to make a factual finding of whether the uninsured subcontractor did or did not have employees. Those findings are not separate from the analysis of Rule 2-H. Thus, the Idaho Department "acted within its statutory

authority...when it reviewed 'the application of' NCCI's Basic Manual Rule 2.H" to an insured's policy. *Travelers*, 467 P.3d at 385. The same result should have been reached here.

C. When Jurisdiction Exists Under Section 462, the Department is Authorized to Make Factual Findings Regarding the Parties' Private Interests

Finally, the Appellate Court erred in finding that the Department was not entitled to make findings of fact or conclusions of law "regarding the parties' private interests in the scope of their insurance contract" because Section 401 of the Insurance Code only applies to matters of public interest. (A 21, at ¶58). The Appellate Court's error on this point stems from its incorrect finding that "the underlying dispute between Prate and Liberty Mutual was an employment status dispute: namely, whether Prate's subcontractor ARW LLC, who had no workers' compensation coverage, had employees that would trigger additional premiums under Prate's policy." (A 21, at ¶58).

The Appellate Court's decision to label this case as an "employment status dispute" was almost certainly about trying to make the decision consistent with *CAT Express*. The problem with this approach is that *CAT Express* was about whether Section 401 provided an independent basis for jurisdiction (and the Appellate Court determined it did not). That is not the case or issue here. Rather, in this case, because an issue concerning application of a manual rule originally conferred jurisdiction on the Appeals Board, the Department had jurisdiction under Section 462 to hear this case.

It is certainly true, following the decision in *CAT Express*, that Section 401 – without more – does not create jurisdiction for the Department to rule on private premium disputes between an insured and an insurer. However, once jurisdiction is conferred on the Department (as was the case here pursuant to Section 462), the Department is explicitly

authorized by the Insurance Code to conduct "examinations, investigations and hearings." See 215 ILCS 5/401(c). Such hearings are governed by the Illinois Administrative Procedure Act. See 215 ILCS 5/407.1. In fact, the Administrative Procedure Act explicitly requires a final decision to include findings of fact and conclusions of law. See 5 ILCS 100/10-50(a).

This was true in the *Travelers* case as well. There the Idaho Department had to answer a similar factual question to the one presented in this case: i.e., did the uninsured subcontractor have any employees? In the matter *sub judice*, the Department found that "ARW LLC had employees during the policy period at issue" (C 22); in the *Travelers* case the Department reached a different factual conclusion. The point, however, is that in both cases the Department had the jurisdictional authority to resolve the factual question in order to resolve the manual rule dispute. That jurisdictional authority is Section 462 in Illinois and Section 41-1622 in Idaho.

The Department's explicit statutory mandate under Section 462 would be rendered meaningless without the authority granted under Section 401. This is true regardless of the fact that Section 401 (in and of itself) does not create an independent basis for jurisdiction. In short, once jurisdiction existed under Section 462, the Department was well within its authority (under Section 401) to hold a hearing and resolve factual questions – including the factual question of whether ARW Roofing had employees.

II. THE DEPARTMENT CORRECTLY FOUND THAT ARW ROOFING (AS AN UNINSURED SUBCONTRACTOR) WAS A PREMIUM PAYROLL AUDIT EXPOSURE ON PRATE'S INSURANCE POLICY

A. The Companies at Issue

In Illinois, determining the premium basis for construction coverage is a straightforward proposition. In construction, any payments made by a contractor to an uninsured subcontractor are automatically included in the premium payroll audit calculations. See 820 ILCS 305/1(a)(3). In contra, Prate has repeatedly tried to use the complicated and convoluted relationship between itself and ARW Roofing, LLC, ARW Roofing, Inc., and Reliable Trade Services, Inc. to sow confusion as to premiums owing.

For example, Prate, ARW Roofing and RTS all used the same insurance agent. (C 342). Prate claimed that both subcontractors had workers' compensation coverage. Prate told Liberty Mutual that, "The insurance certificates name both ARW Roofing, LLC and Reliable Trade Services, LLC." (C 343). As to workers' compensation, this statement was false. The insurance agent noted that the "GL & Excess policies still have both names [i.e., ARW Roofing and RTS] on the policy." (C 342). However, "Our agency provides Workers Compensation Insurance coverage [only] for Reliable Trade Services, Inc. We do not write any workers compensation coverage for ARW Roofing." (C 344, emphasis added).

Stated differently, Section D of the certificate – which lists the workers' compensation coverage – states that coverage is only for RTS (i.e., "Reliable Trade Serv Only"). (C 323). Because Prate was the certificate holder, it knew that only RTS (and not ARW Roofing) had workers' compensation insurance coverage. (See C 322-323and C 331-332). Prate apparently did not see the need to share this information.

In like fashion, Prate also previously argued that "ARW and RTS are the same company. All that occurred was a name change made in 2013." (C 96).[2] Here, as in many other instances, Prate sought to obscure which company it was actually talking about – ARW Roofing, LLC (the uninsured subcontractor in this case) or ARW Roofing, Inc. (a company which is not at issue). Moreover, if there was merely a "name change" then payments should have been made to one company and then shifted to the other company. Instead, both entities were being paid at various times concurrently throughout the policy period at issue. In fact, the Department found these two companies "remained legally independent of one another." (C 21).[3]

Ultimately, the Department considered and fully addressed the fact that RTS had its own policy and (correctly) held that ARW Roofing, "would not be covered under the policy for RTS." (C 21). This finding is fully supported by the record, including the fact that while ARW Roofing had certain lines of insurance (e.g., commercial general liability and automobile liability), workers' compensation coverage was provided to "Reliable Trade Serv Only." (C 323).

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In its "explanatory" correspondence of June 20, 2016, Prate never distinguishes between ARW Roofing, LLC and ARW Roofing, Inc. when describing the "name change" to RTS. (C 95). This is but one of many examples where Prate tried to hide the fact that ARW Roofing, LLC – the subcontractor at issue in this case – did not have workers' compensation insurance coverage.

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During the policy period, the payments made by Prate to ARW Roofing totaled $300,673.56 – of which 10% was excluded for materials – resulting in $270,606.20 being added to Prate's audited payroll exposure. During the same policy period, the payments made by Prate to RTS totaled $500,705.48. These payments were excluded from Prate's audited payroll exposure because RTS had workers' compensation insurance (with Amerisafe). (See C 209; see also C 296-341; and C 353-360).

B. Subcontractor ARW Roofing, LLC Did Not Have Workers' Compensation Insurance Coverage

Prate has since conceded that ARW Roofing was an "uninsured subcontractor" of Prate. (C 609). Now that the lack of coverage of ARW Roofing is undisputed, resolution of this case comes down to simple application of NCCI Basic Manual Rules (i.e., Basic Manual Rule 2-H).

Prate obtained coverage through the Illinois Assigned Risk Plan. (C 19). The Assigned Risk Plan "provides a method for employers to obtain workers' compensation insurance coverage through the residual market when they cannot obtain it on their own." *LM Ins. Corp. v. B&R Ins. Partners, LLC*, 2016 IL App (1st) 151011, ¶4. The Assigned Risk Plan is administered by the NCCI, which "binds coverage and then assigns the risk to a servicing carrier." *Id*. As administrator of the Assigned Risk Plan, the NCCI is tasked with developing and filing "its Plan and associated rates, rating plans, rules, forms and manuals." 50 Ill. Admin. Code 2904.40.

Here, the Hearing Officer confirmed the application of the above, noting that Prate's coverage was, "'provided under the Workers Compensation Law of Illinois...in accordance with the Plan rules' and that coverage would be 'afforded under the applicable Workers Compensation Insurance Plan developed or administered by NCCI.'" (C 23).

The treatment of uninsured subcontractors, as regulated by NCCI's Basic Manual Rule 2-H, provides (in part) as follows:

> 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.

(C 350-351; C 385-386).

Since the question of whether ARW Roofing was an uninsured subcontractor is undisputed (C 20; C 609), the next question toward application of Manual Rule 2-H is whether Illinois was one of the states "where workers compensation laws provide that a contractor is responsible for the payment of compensation benefits to employees of its uninsured subcontractors." The answer to that question is clearly "yes" because the Illinois Workers' Compensation Act specifically requires the following:

> Any one engaging in any business or enterprise referred to in **subsections 1 and 2 of Section 3 of this Act** who undertakes to do any work enumerated therein, is liable to pay compensation to his own immediate employees in accordance with the provisions of this Act, and **in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay compensation under this Act**, or guaranteed his liability to pay such compensation.

820 ILCS 305/1(a)(3) (emphasis added).

Prate is a "roofing and construction installations contractor." (C18). As such, Prate's business operations fall within the scope of 820 ILCS 305/3(2) (i.e., "Construction, excavating or electrical work"). This means that Prate constitutes an entity engaged in an extra-hazardous occupation under the Illinois Workers' Compensation Act. Consequently, 820 ILCS 305/1(a)(3) applies to Prate. Per 820 ILCS 305/1(a)(3), if Prate has an uninsured subcontractor do any work, Prate is "liable to pay compensation to the employees of any such contractor or sub-contractor."

As stated by the Department, "if a subcontractor, such as ARW LLC, has employees but does not have the requisite workers compensation coverage, then a contractor, such as Prate Roofing, that engages the subcontractor to do work would be liable to pay compensation to the subcontractor's employees." (C 22). Accordingly, NCCI Basic Manual Rule 2-H applies to Prate, and Liberty Mutual was required under Rule 2-H to include the exposure of the uninsured subcontractor ARW Roofing.

Further, the Department also found that Prate"contractually consented to the laws of Illinois and specific rules of the NCCI, which allow for the determination of a premium based upon uninsured subcontractors with employees engaged in work for the policyholder." (C 23).

Therefore, as stated by the Department's Hearing Officer:

> Because Prate Roofing's policy must cover "the entire compensation liability of the insured," and because Prate Roofing would be liable to pay compensation to ARW LLC's employees if ARW LLC lacked its own coverage, Liberty Mutual would be required by law to assume that liability under those circumstances.

(C 23).

To restate, if an uninsured subcontractor (such as subcontractor ARW Roofing) is working for a general contractor (such as roofing company Prate), that uninsured subcontractor is automatically covered under the general contractor's workers' compensation insurance policy. See 820 ILCS 305/1(a)(3). Further, pursuant to the contractual language of the Policy, the insurance company is required to charge premiums based on the uninsured subcontractor's payroll. (C 280). That is exactly what happened in this case – and exactly what *should* have happened. As stated by the rules of the Illinois Assigned Risk Plan (per Rule 2-H of the Basic Manual), "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..." (C 208 at ¶22).

It also bears note that the Department's finding on this mixed question of law and fact is subject to the "clearly erroneous" standard. *AFM Messenger Serv. v. Dep't of Empl. Sec.*, 198 Ill. 2d 380, 392. As stated by the Supreme Court, "Review for clear error is significantly deferential to an agency's experience in construing and applying the statute that it administers." *Bd. of Educ. of Chi. v. Ill. Educ. Labor Rels. Bd.*, 2015 IL 118043, ¶18.

C. No Middleman Exception Exists or Applies

Although Prate now acknowledges the requirements of 820 ILCS 305/1(a)(3), Prate has also argued – without any legal authority – that the statute does not apply to "an uninsured subcontractor who acts merely as a middleman who turns around and sub-subcontracts all labor to another subcontractor who is properly insured for workers compensation." (C 608). However, there simply is no basis in the Workers Compensation Act for Prate's "middleman" exception.

Confusingly, Prate states that it "does not suggest that there is a 'middlemen exception' to the Workers' Compensation Act" while simultaneously arguing that "the insured status of a middleman without employees is irrelevant." (C 609). This Honorable Court can look to the plain language of the Illinois Workers Compensation Act and see that no "middleman exception" exists. See 820 ILCS 305/1(a)(3). The same is true for NCCI Basic Manual Rule 2-H. (C 385-386). The same is true for the Policy. (C 280). Prate's use of the term "middleman" is not a term of art under the Workers' Compensation Act. Rather, it is just Prate's attempt to excuse itself from the obligations of the Illinois Workers Compensation Act. However, calling an uninsured subcontractor a "middleman" does not change the fact that the NCCI Manual Rules – and the Policy at issue – require Liberty Mutual to include the payments made by Prate to uninsured subcontractors.

Notwithstanding the above, and without citation to any authority, Prate continues to cling to its middleman argument, contending that, "if a subcontractor has no employees that can get hurt on a project, there is no liability exposure to the hiring contractor; it's just common sense." (Prate's Appellate Brief, page 25). Unfortunately, the facts do not support Prate's "common sense" argument. Further, Prate's "common sense" argument does not negate the obvious point that unless Prate was engaged in some nefarious activity, Prate paid ARW Roofing for services rendered in the construction field – and it is that payment (i.e., the payroll) that constitutes the premium audit exposure.

But Prate claims that it "provided uncontradicted proof to the DOI [i.e., the Department] that ARW Roofing, LLC had no employees and all labor was performed by

employees of Reliable Trade Services, who was properly insured." (Prate's Appellate Brief, page 25). However, Prate's "uncontradicted proof" is anything but.

In direct contradiction to Prate's no employee argument, the Department in fact specifically found that ARW Roofing "likely had employees to carry out contracts on behalf of Prate Roofing and/or RTS." (C 21). Indeed, the Department noted that a "telling admission" was made by Prate's president Cynthia Rossetti when she stated that ARW Roofing and RTS would complete contracts for one another. (C 21). The Department found that this statement "contradicts the assertion that only RTS provided employees, as it would be impracticable for a construction entity such as ARW LLC to complete projects for RTS without employees of its own." (C 21). Ultimately, the Department found a "lack of reliable evidence" from Prate that the payments made to ARW Roofing "were not intended to cover employees actually employed by ARW LLC." (C 22).[4]

Liberty Mutual's auditor throughly examined Prate's available records (including documents produced in discovery) in order to determine the correct exposure. In her detailed affidavit, Ms. Murphy concluded that for the policy period at issue, there was no indication that the payroll exposure from ARW Roofing's employees was reported or paid for – or that any other workers' compensation insurance coverage was available to them. (C 210).

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[4] Interestingly, Mr. Prate claimed that Prate entered into contracts for work with ARW Roofing, LLC – despite also claiming that "ARW Roofing, LLC never had any employees." (C 406-407). Such an assertion does not make sense. If ARW Roofing, LLC had no employees, why would Prate hire ARW Roofing to do roofing work – and continue to pay them throughout the policy period?

As stated by Ms. Murphy:

> ...invoices were issued that did not match the hours worked on the payroll summaries or the crew weekly time sheets. In addition, the amounts paid by Prate Roofing did not always correlate to invoices issued by RTS or ARW Roofing – and to further complicate things Prate Roofing was issuing invoices to both RTS and ARW Roofing. The audit completed by American Interstate Insurance Company (RTS's insurance company) does not identify any wages for ARW Roofing as it did in the past – nor does it provide any reference to what happened with these wages.

(C 210).

Even during discovery before the Department, Liberty Mutual continued to seek any factual basis that would support Prate's claims. For example, in its First Set of Interrogatories, Liberty Mutual asked Prate the following questions and received the following responses:

> **18.** In 2014 and 2015, please set forth all audit exposure payroll details disclosed by Reliable Trade Services, Inc. to its workers' compensation insurance carrier regarding work performed for Prate.
>
> **ANSWER**: Unknown.
>
> **19.** In 2014 and 2015, please identify any and all payments from ARW Roofing, LLC to Reliable Trade Services, Inc.
>
> **ANSWER**: Unknown
>
> **20.** What did ARW Roofing, LLC do with the payments it received from Prate in 2014 and 2015? Did it transfer same to Reliable Trade Services in full or in part. Specifically, how much?
>
> **ANSWER**: Unknown.

(C 372).

The Department recognized that these answers were simply not credible. In a discerning comment, the Department noted that, "Given that Mr. Gurdak had been given

ownership of ARW LLC from Emmolly and was willing to cooperate with Prate Roofing by providing an affidavit for this hearing, and given that Ms. Rossetti was the owner of Prate Roofing, and given that Prate Roofing purported to have a basis for asserting that RTS supplied laborers to ARW LLC, it is dubious that no information could have been provided to Liberty Mutual through these interrogatories to substantiate that ARW LLC had no employees." (C 22). Precisely. Prate can propound convoluted theories but Prate cannot (or will not) answer basic questions – and the Department's factual conclusion regarding same is entitled to manifest weight of the evidence standard. [5]

Prate (and its related companies) control all of the information relevant to ARW Roofing. For reasons which can only be guessed at, Prate (and its related companies) do not want to disclose what happened with the money paid to ARW Roofing. That is Prate's choice, but it has consequences. The Hearing Officer judiciously noted that "Prate Roofing had the opportunity to provide an alternative explanation" for the payments made to ARW Roofing, LLC, but did not to do so. (C 22). Moreover, the Department also found Prate's affidavits to be "contradictory" – which indeed they are. (C 21).

Notwithstanding the detailed factual record promulgated by the Department (C 19-24), Prate – with a straight face – asserts that the Department either ignored or did not understand the arguments it was making – but that is simply not credible.

In fact, and directly to the point, the Department stated that:

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The audit system works because the insurer has the contractual right to audit the insured under the policy. (C 280, at "Records" and "Audit"). The insurer has no right to audit anyone else.

> Prate Roofing has not offered satisfactory explanations to counter the Department's conclusion that ARW LLC possessed employees, and was thus liable to Liberty for additional workers compensation coverage. In its analysis, the Department carefully examined the evidence offered by both parties, including repeated citation of Prate Roofing's affidavits. Despite Prate Roofing's dealings with its subcontractors RTS and ARW LLC. Prate Roofing has offered no evidence, beyond conclusory statements, for these discrepancies, and insisting on the veracity of its evidence at face value to the exclusion of contradictory evidence presented by it to the Department.

(C 28).

As it did before the Department, Prate wants everyone to accept its conclusory assertions "at face value to the exclusion of contradictory evidence." Prate's lack of evidence is telling (most particularly in its failure to account for monies paid to ARW Roofing). (C 372). Prate does not produce facts, or evidence, in support of its assertions. Liberty Mutual's auditor reviewed the discovery documents in this case and her affidavit stated, "There is simply no clear indication that the payroll exposure from ARW Roofing's employees was reported or that workers' compensation coverage was available to them." (C 210). In short, the Department fully understood Prate's arguments – but rejected them based upon a review of the "contradictory evidence" in the record.

The Department's determination is entitled to significant deference. As stated by this Court, "a reviewing court does not weigh the evidence or substitute its judgment for that of an administrative agency. Instead, a reviewing court is limited to ascertaining whether such findings of fact are against the manifest weight of the evidence." *City of Belvidere v. Ill. State Labor Rels. Bd.*, 181 Ill. 2d 191, 204 (1998).

D. Prate Wants to Shift the Burden

As a fallback argument, Prate has argued that the burden should shift to Liberty Mutual to prove that "ARW Roofing LLC had its own employees *who worked on Prate jobs*." (Prate's Appellate Brief, page 28, emphasis in original). In other words, rather than answer the question, Prate Roofing would have one question the answer. On this point Prate also takes issue with the Department's reliance on "a document submitted by Prate to show the cost of labor on the relevant projects." Once again Prate provides no legal authority for its arguments (i.e., that the burden should shift to Liberty Mutual).

Prate's argument is not well taken, as Liberty Mutual has met its burden. In a situation like this, under NCCI Manual Rules, an uninsured subcontractor exposure goes into the audit. Prate's burden shifting argument notwithstanding, premiums must be computed according to the Manual Rules. As the Department correctly found, "coverage is provided under the Workers Compensation Law of Illinois...in accordance with the plan rules." (C 23). That is what Liberty Mutual did. This is no more a burden of proof issue than is the fact that the audit process for taxation requires proof to support deductions (i.e., to reduce taxable income exposure). In other words, Liberty Mutual did meet its burden, it is Prate who has, in turn, failed to rebut same with any credible evidence.

Claimant fraud (such as a worker faking an injury) is relatively well known. Less well known – but arguably more serious – is premium fraud wherein (through some form of payroll suppression) premiums owed by the insured are hidden and not paid. Whether that is the case here is not known. What is known is that Prate always had differing arguments and explanations but never offered consistent facts to support them. The Department's

Findings of Fact properly recognized anomalies, contradictions and credibility issues regarding Prate and its case – and these determinations are subject to significant deference.

As Courts have previously stated, "On administrative review, neither this court nor the circuit court can reweigh the evidence or the determination of the credibility of the witnesses, which is to be made by the agency. Determinations as to the weight of evidence and the credibility of witnesses are matters within the province of the agency." *Gernaga v. City of Chicago*, 2015 IL App (1st) 130272, ¶13 (internal citations omitted).

E. No Evidence Exists that Liberty Mutual Miscalculated the Premium

Prate has also argued that Liberty Mutual miscalculated Prate's premiums "by using 90% of the full contract prices paid to ARW LLC rather than the actual labor cost." (Prate's Appellate Brief, page 30). Once again, Prate makes its arguments without any citation to the relevant rules on this topic.

Ultimately, it is the NCCI Manual Rules which establish the basis for determining premiums. Specifically, Manual Rule 2-H states that "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." (C 385-386). Rule 2-H Table 1 and Table 2, in turn, provide that "if the contractor has not furnished evidence of workers compensation insurance," and the job involves "labor only," then the "minimum to calculate additional premium is...Not less than 90% of the subcontract price." (C 385-386).

The Manual Rules specifically acknowledge the possibility that a contractor such as Prate "does not furnish complete payroll records." (C 385-386). Here, Liberty Mutual's

auditor explained, "Since neither Prate nor ARW provided any invoices to allow [Liberty Mutual] to determine the jobs involved, cost breakdown, or the timeframe for the jobs in which payment is in question; the audit was completed with the information available." (C 351).

As testified to by Liberty Mutual's auditor, "as indicated in the audit, the total payments made by Prate Roofing to ARW Roofing was $300,673.56 – of which 10% was excluded for materials – resulting in a total of $270,606.20 being added to Prate Roofing's audited payroll exposure." (C 209 at ¶28).

Prate has argued that it "submitted payroll records for Reliable, but the evidence was ignored by the Agency." (Prate's Appellate Brief, page 30). This is both incorrect and irrelevant. Payroll records for RTS are not sufficient to determine the payroll for ARW Roofing. As stated by the Department:

> ...given Prate Roofing's apparent inability to supply any payroll records for the ARW LLC employees (or, alternatively, to supply sufficient financial records from ARW LLC showing that all income, expenditures, assets, and liabilities were accounted for with no employees on payroll during the policy period at issue), practically speaking there is no other basis for estimating the applicable payroll and other remuneration for the employees.

(C 23).

Prate has repeatedly argued that the Department "misinterpreted" the payroll records for RTS. However, this argument does not withstand scrutiny. As stated in the affidavit of Liberty Mutual's auditor, "invoices were issued that did not match the hours worked on the payroll summaries or the crew weekly time sheets." (C 210). More importantly, as stated by the Department, "Prate Roofing has offered no evidence that Liberty incorrectly calculated the additional premium. Prate Roofing has not refuted that it was subject to the NCCI's

Basic Manual for workers' compensation coverage. Prate Roofing has offered no evidence contradicting the assertion that Liberty calculated the additional premium according to Tables 1 and 2 of Rule 2-H of the NCCI's Basic Manual, which was the contract price for ARW LLC's services and materials for Prate Roofing." (C 28). The Circuit Court reviewed the same argument being advanced by Prate and stated:

> ...the standard of review would clearly be erroneous. For this issue, the officer reviewed the policy between Prate and Liberty and the policy allowed for calculations in one of two ways, and one way was based on payroll, and if no payroll records, then the contract price for the services. So the officer determined that because Prate did not provide the payroll records, that ARW employees properly used 90 percent of the subcontractor price. Again, I don't find that there has been shown that this was clearly erroneous, so therefore, that issue is also affirmed.

(R 7).

Under the Manual Rules – which both Liberty Mutual and Prate are bound to – premiums for uninsured subcontractors must be calculated according to Tables 1 and 2 of Rule 2-H of the NCCI's Basic Manual. That is what Liberty Mutual did. (C 209 at ¶28; C 351).

CONCLUSION

For the reasons discussed above, the Appellate Court's Order vacating this matter for a lack of jurisdiction should be reversed, and the prior orders of the Department and the Circuit Court should be affirmed.

Respectfully submitted,

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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 or words 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 40 pages.

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Liberty Mutual Insurance Corporation

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, John C. Schmadeke, an attorney, hereby certify that on November 2, 2021, I electronically filed the foregoing BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT LIBERTY MUTUAL INSURANCE CORPORATION with the Clerk of the Supreme Court of Illinois using the Odyssey E-File Illinois system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey E-File Illinois system, and thus will be served via the Odyssey E-File Illinois system.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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Appendix

2021 IL App (1st) 191842-U

No. 1-19-1842

Order filed March 5, 2021

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PRATE ROOFING AND INSTALLATIONS, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 18 CH 9826
	)	
LIBERTY MUTUAL INSURANCE CORPORATION, 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,	)	The Honorable
	)	Caroline Kate Moreland,
	)	Judge, Presiding.
	)	
	)	
	)	
Defendants-Appellees.	)	

JUSTICE ODEN JOHNSON delivered the judgment of the court.
Presiding Justice Mikva and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The Department of Insurance did not have authority to determine whether Prate's subcontractor's employees triggered additional premiums on its workers' compensation insurance held by Liberty Mutual. Therefore, we vacated the Department of Insurance's final order and the circuit court's affirmance thereof. The circuit court properly dismissed the hearing officer as an unnecessary party and

dismissed the declaratory judgment count without prejudice for lack of subject matter jurisdiction.

¶ 2 Plaintiff Prate Roofing and Installations, LLC (Prate) appeals an order from the Circuit Court of Cook County which affirmed the final decision of the Director of the Illinois Department of Insurance (DOI) in favor of defendant, Liberty Mutual Insurance Company (Liberty Mutual), and against plaintiff, Prate, regarding the parties' workers' compensation insurance dispute. The parties disputed whether Prate owed Liberty Mutual additional workers' compensation insurance premiums because certain subcontractors hired by Prate did not have individual coverage. Prate challenged that determination before the DOI, which agreed with Liberty Mutual following a hearing before Hearing Officer Patrick Riley (Riley). Then Director of the DOI, Jennifer Hammer,[1] entered an order finding that Prate owed additional workers' compensation premiums in the amount of $127,305.

¶ 3 Prate subsequently filed suit in the circuit court of Cook County, seeking administrative review of the Director's final decision and an additional claim for declaratory judgment as to the amount of the premium owed to Liberty Mutual. The circuit court affirmed the Director's decision and dismissed the claim for declaratory judgment.

¶ 4 Prate has timely appealed, contending that: (1) the DOI lacked authority to issue its final order, which is therefore void pursuant to this court's holding in *CAT Express, Inc. v. Muriel and Liberty Mutual Insurance Co.*, 2019 IL App (1st) 181851; (2) the circuit court erred in dismissing its request for declaratory relief on an issue upon which the DOI had expressly declined and lacked

[1] At the time of the Director's final order, the Director of the Department was Jennifer Hammer, who was initially named as an appellee in this case. She has been succeeded in that position by Robert H. Muriel. We have amended the caption of this appeal to reflect the proper party pursuant to section 2-1008(d) of the Code of Civil Procedure. 735 ILCS 5/2-1008(d) (West 2020).

authority to rule; and (3) the DOI erred in finding that ARW LLC had its own employees who worked on Prate jobs to justify Liberty Mutual's charging an addition premium of $127,305. For the reasons that follow, we vacate the DOI's final order as it lacked authority to resolve the parties' dispute, and further vacate the judgment of the circuit court affirming the DOI's order as such order was void.

¶ 5 BACKGROUND

¶ 6 A. Proceedings Before the DOI

¶ 7 This case came before the DOI on appeal by Prate after it initially sought administrative relief from the Illinois Workers Compensation Appeals Board (Board). Prate filed an appeal with the Board to contest Liberty Mutual's determination that it owed additional workers' compensation premiums in the amount of $127,305. In May 2016, the Board held a hearing on Prate's dispute and issued its case summary and decision on June 2, 2016, which was disclosed to the parties in a letter from the National Council on Compensation Insurance (NCCI). In its letter, the NCCI informed the parties that the Board did not have enough information to rule on whether Liberty Mutual improperly charged Prate for exposure to liability due to Prate's use of a possibly uninsured subcontractor. The letter also notified Prate of its right to appeal, and subsequently appealed the decision to the DOI.

¶ 8 Hearing Officer Riley was assigned to the case. Following discovery, both parties agreed to waive their rights to an in-person hearing before the DOI and requested that the issues be determined by written submissions and exhibits. Upon review of the submissions and exhibits, Hearing Officer Riley made the following written findings of fact, conclusions of law and recommendations.

¶ 9 Defendants aside, there are four entities relevant to this case: Prate, ARW Roofing, Inc. (ARW, Inc.), Reliable Trade Services, Inc. (RTS), and ARW LLC. Prate was a roofing and construction installations contractor and Illinois limited liability company[2], owned by Cynthia Rosetti. Michael Prate (M. Prate) was a former agent and officer of Prate, but currently serves as an employee. ARW Inc. was an Illinois company that entered into agreements with Prate for contracting services. ARW Inc. was involuntarily dissolved in August 2015. RTS was an Illinois corporation which also entered into contracts with Prate. ARW LLC was a limited liability company organized by Emmolly Corporation (Emmolly), of which M. Prate was President. ARW LLC also entered into contracts with Prate during the policy period at issue.

¶ 10 According to Prate, from May 1, 2013, to May 1, 2014, ARW Inc. carried workers' compensation insurance. On August 1, 2013, RTS was formed and listed ARW Inc.'s policy as its workers' compensation coverage, claiming that ARW Inc.'s name was changed to RTS.

¶ 11 In 2013, Prate sought and obtained workers' compensation coverage through the Illinois Assigned Risk Plan. Liberty Mutual was randomly assigned as Prate's workers' compensation insurance carrier, and issued an initial policy that became effective on October 18, 2013. Liberty Mutual issued Prate a renewal policy (WC5-34S-540426), which is the policy at issue, that was effective October 18, 2014, through June 28, 2015. Pursuant to the policy provisions, in 2015, Prate was subject to both a self-audit and a premium audit. The premium audit would be conducted by Liberty Mutual to determine if Prate had properly provided workers' compensation insurance

[2] Although the hearing officer's written findings describe Prate as a "limited liability corporation," we take judicial notice that in the State of Illinois, LLC refers to a limited liability company.

certificates for all of its subcontractors; Lisa Murphy (Murphy) was assigned as the auditor for Liberty Mutual's audit.

¶ 12 As part of the self-audit, Prate disclosed that it had made payments to RTS, ARW Inc., and ARW LLC between October 18, 2014, and June 28, 2015. Murphy testified that, while Prate provided certificates of workers' compensation insurance coverage for RTS, it did not present one for ARW LLC. Based on those findings, Liberty Mutual argued before the DOI that Prate utilized services from ARW LLC, which did not carry workers' compensation coverage, and thus exposed Liberty Mutual to liability, for which it assessed Prate an additional premium of $127,305.

¶ 13 Conversely, Prate argued that, because ARW LLC had no employees, that entity could not perform work which would need to be covered under Illinois workers' compensation law or the NCCI Basic Manual[3], and thus Prate did not expose Liberty Mutual to liability. Prate further argued that it would be improper to factor any payments to that entity into Liberty Mutual's premium calculations.

¶ 14 Riley further found that it was undisputed that Prate contracted with several subcontracting entities: in 2013, Prate subcontracted with ARW Inc. and in August 2013, Prate subcontracted with RTS, which listed the workers' compensation policy used by ARW Inc. At issue was whether Liberty Mutual justifiably assessed Prate an additional premium for its use of services by ARW LLC, which it deemed an uninsured contractor. Riley noted that the central questions to be considered were: (1) did ARW LLC have a workers' compensation insurance policy during Prate's

[3] The NCCI Basic Manual for Workers Compensation and Employers Liability Insurance contains rules, classification descriptions, rates/loss costs for each classification and state-specific exceptions for writing workers compensation insurance. https://www.ncci.com/ServicesTools/Pages/BM2001.aspx

period of coverage at issue in the hearing; (2) did ARW LLC have any employees who were required to be covered according to Prate's policy; (3) did the arrangements between Prate and ARW LLC expose Liberty Mutual to workers' compensation liability and subject Prate to an increased premium; and (4) if Liberty Mutual was exposed to liability from ARW LLC, did Liberty Mutual appropriately use certain payments from Prate to ARW LLC as the basis for calculating the additional premium.

¶ 15 With respect to the first question, Riley found that it was undisputed that ARW LLC did not have a workers' compensation insurance policy of its own during Prate's policy period of October 2014 through June 2015. Riley noted that, "a common pattern in the filings offered [by the parties] that initially complicates th[e] determination [was] the conflation of ARW LLC with ARW Inc." As an example, Riley noted that both parties refer to an NCCI ownership name change ruling regarding "a subcontractor ARW." However, the NCCI did not define which "ARW" was the subject of its ruling. Additionally, the NCCI stated that "Board could not confirm or refute whether the legal status issue of ARW being an 'LLC' or an 'Inc.' when work was performed had a bearing on the dispute." In August 2013, when RTS was formed, it obtained workers' compensation insurance. According to M. Prate, Emmolly organized ARW LLC for the purpose of purchasing ARW Inc., but the purchase did not occur, and he further claimed that Emmolly signed over ownership of ARW Inc. to Michael Gurdak (M. Gurdak). M. Prate further stated that M. Gurdak should have filed the documentation with the Secretary of State, indicating some ambiguity as to the status of ownership, but confirmed that ARW Inc. and ARW LLC were two separate organizations. Riley also found that M. Prate and M. Gurdak, along with Rosetti, were knowledgeable about the status and business dealings of the two entities, as detailed in affidavits

and answers to Liberty Mutual's interrogatories. Riley ultimately concluded that ARW Inc. and ARW LLC were legally independent of one another despite common ownership or management, and further that ARW LLC did not have insurance coverage, either independently or in association with another entity during the policy period at issue.

¶ 16 Regarding the second issue, Riley noted Prate's assertion that ARW LLC had no employees; instead, the labor was supplied by RTS. That assertion was echoed by both M. Prate and M. Gurdak in their respective affidavits. However, based on other information supplied during discovery, Riley concluded that ARW LLC was considered a separate entity for the purposes of workers' compensation coverage and that ARW LLC likely had employees to carry out contracts on behalf of Prate and/or RTS. Most notably, Prate supplied several documents that listed RTS at the top and appeared to be proofs of payment by RTS to ARW LLC for workers' compensation payroll during the policy period at issue. This was a further indication that ARW LLC had its own employees for which RTS covered the cost of exposure. Prate had the opportunity to provide an alternative explanation for those payments through its answers to Liberty Mutual's interrogatories, but did not. Thus, Hearing Officer Riley specifically found that ARW LLC had employees during the policy period at issue.

¶ 17 With respect to the third issue, Riley noted that Prate and its subcontractors with employees were required to carry workers' compensation coverage under section 305/1(a)(3) of the Illinois Workers Compensation Act (Act). 820 ILCS 305/1(a)(3) (West 2018). That section provides that, if a subcontractor, such as ARW LLC, had employees but did not have the requisite workers' compensation coverage, then a contractor, such as Prate, that engaged the subcontractor to do work would be liable to pay compensation to the subcontractor's employees. 820 ILCS 305/1(a)(3)

(West 2018). Further, section 305/4(a)(3) of the Act provides that the general contractor and any subcontractors who fall within the provisions of section 3 of the Act must insure the entire liability of all employees and the entire compensation liability of the insured. 820 ILCS 305/4(a)(3) (West 2018).

¶ 18 Hearing Officer Riley found that because Prate's policy must cover "the entire compensation liability of the insured," and because Prate would be liable to pay compensation to ARW LLC's employees if ARW LLC lacked its own coverage, Liberty Mutual would be required by law to assume that liability under the circumstances. It followed then that Prate was required both to secure workers' compensation coverage for itself as principal and to ensure that ARW LLC had coverage as a subcontractor. Based on the prior findings that ARW LLC had employees during the policy period but lacked its own coverage, Hearing Officer Riley found that Liberty Mutual was exposed under Prate's policy to workers' compensation liability from ARW LLC's employees.

¶ 19 With respect to the final issue, Riley noted that the contract language in the policy stated that the premium included "payroll and other remuneration[4] paid," which included "the insured's direct employees" and "all other persons engaged in work that could make [Liberty Mutual] liable." Under the Act, Riley found that the ARW LLC employees could have made Liberty Mutual liable, so it was proper to assess some amount of premium for them. Prate disputed that its insurance coverage was also bound by Rule 2-H of the NCCI Basic Manual, which states that "the

[4] Remuneration is payment for work or services. https://dictionary.cambridge.org/us/dictionary/english/remuneration

contractor must furnish satisfactory evidence that the subcontractor has workers[‘] compensation insurance in force." Nevertheless, Riley noted that the binder of coverage initially issued to Prate stated that coverage was provided under the state's workers' compensation laws "in accordance with the Plan rules," and that coverage would be given "under the applicable Workers' Compensation Insurance Plan developed or administered by NCCI." As such, Riley found that Prate "contractually consented to the laws of Illinois and specific rules of the NCCI," that allowed for the "determination of a premium based upon uninsured subcontractors with employees engaged in work for the policyholder."

¶ 20 According to the policy at issue's provision regarding premiums, Liberty Mutual could only assess a premium "determined by multiplying a rate times a premium basis," which included "payroll and all other remuneration paid or payable during the policy period for services of: 1) all your officers and employees engaged in work covered by th[e] policy; and 2) all other persons engaged in work that could make [Liberty Mutual] liable under Part One of th[e] policy." The policy further provided that if the insured did "not have payroll records for [those] persons, the contract price for their services and materials may be used as the premium basis." Accordingly, Riley found that, under the terms of the policy, Liberty Mutual could charge a premium based on the contract price for ARW LLC's services and materials for Prate during the policy period at issue, which would be reflected in Prate's payments to ARW LLC.

¶ 21 Despite Prate's argument that it would be improper to factor any payments to ARW LLC into Liberty Mutual's premium calculations, Riley found that given Prate's "apparent inability" to supply any payroll records for the ARW LLC employees or supply sufficient financial records from ARW LLC showing that there were no employees, there was no other basis for estimating

the applicable payroll and other remuneration for the employees. Further, Riley found that Liberty Mutual had no contractual or statutory right to audit ARW LLC directly to obtain those records based on prior DOI precedent, and as such, it was permitted to use the contract price for services and materials as the basis for premium.

¶ 22 In her affidavit, Murphy averred that during her audit of Prate, she found that the total payments made by Prate to ARW LLC was $300,673.46.[5] After excluding 10% for materials, a total of $270,606.20 was added to Prate's audited payroll exposure. In a letter sent to the NCCI by Liberty Mutual, Murphy stated that the additional premium was calculated according to Tables 1 and 2 of Rule 2-H of the Basic Manual. Rule 2-H provided for the additional premium to be calculated based on "not less than 90% of the subcontract price" for labor only. Hearing Officer Riley found that Liberty Mutual permissibly used an estimated payroll amount of $270,606.20, which was 90% of the total subcontract price between ARW LLC and Prate, as the basis for calculating the additional premium owed by Prate.

¶ 23 Hearing Officer Riley concluded, "based upon a preponderance of the evidence and upon consideration of the Record as a whole or such portion thereof as may be supported by competent material and substantial evidence," Liberty Mutual's calculation of the additional premium due to the policy at issue should be upheld. Therefore, Riley recommended to the Director of the DOI that: Liberty Mutual was entitled to the premium charges assessed to Prate regarding workers' compensation policy number WC5-34S-540426-024, and that the costs of the proceeding be waived.

[5] This figure was based on Prate's profit and loss statement for the period between October 18, 2014 and June 28, 2015 that was sent to Liberty Mutual as part of its self-audit.

¶ 24 On May 7, 2018, the Director of the DOI adopted the hearing officer's findings of fact, conclusions of law, and recommendations, and ordered that Liberty Mutual was entitled to the disputed premium charges.

¶ 25 B. Prate's Motion for Rehearing

¶ 26 Prate subsequently filed a motion for rehearing on May 15, 2018. The DOI found that: Prate failed to demonstrate good cause or legally sufficient grounds to reopen the matter; did not offer satisfactory explanations to counter the DOI's conclusion that ARW LLC possessed employees, and was thus liable to Liberty Mutual for additional workers' compensation coverage; Prate offered no evidence that Liberty Mutual incorrectly calculated the additional premium; and Prate asserted conclusory statements on the weight of the evidence and application of law, but did not provide evidence that would alter the analysis upon which the final order rested. However, the DOI stated that "it [was] not for the Department to determine the specific amount of the premium charge, but that the parties under the contract conduct themselves within the statutory and regulatory bounds of Illinois law." The DOI denied Prate's motion for rehearing on July 10, 2018.

¶ 27 C. Circuit Court Proceedings

¶ 28 Prate then filed its complaint for administrative review and additionally sought a declaratory judgment concerning the correct amount of the additional premium owed to Liberty Mutual in the circuit court of Cook County on August 1, 2018.

¶ 29 The DOI filed a section 2-615 (735 ILCS 5/2-615 (West 2018)) motion to dismiss Hearing Officer Riley as an unnecessary party and to dismiss Prate's request for declaratory relief, arguing that its sole remedy was administrative review. Prate responded that it was entitled to declaratory relief since the DOI indicated that it was not its job to determine the specific amount of premium

due. On December 12, 2018, the circuit court dismissed Riley as a defendant and dismissed the declaratory judgment count of Prate's complaint as procedurally improper, both without prejudice. The court's order did not contain Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)) language. The circuit court affirmed the Director's final order on August 14, 2019. This timely appeal followed.

¶ 30 ANALYSIS

¶ 31 On appeal, Prate contends that: (1) the DOI lacked authority to issue its final order, which is therefore void pursuant to this court's holding in *CAT Express, Inc. v. Muriel and Liberty Mutual Insurance Co.*, 2019 IL App (1st) 181851; (2) the circuit court erred in dismissing its request for declaratory relief on an issue upon which the DOI had expressly declined and lacked authority to rule; and (3) the DOI erred in finding that ARW LLC had its own employees who worked on Prate jobs to justify Liberty Mutual's charging an addition premium of $127,305.

¶ 32 A. Jurisdiction

¶ 33 As a preliminary matter, we address the issue of jurisdiction, as raised by the DOI in its brief. The DOI contends that a potential jurisdiction question arises because the circuit court's dismissal, of Riley as a defendant and the declaratory judgment count of Prate's complaint without prejudice, was not a final judgment. Additionally, the order entered on August 14, 2019, did not contain Rule 304(a) (eff. Mar. 8, 2016) language. Further, the DOI asserts that the circuit court "seemed to intend the words 'without prejudice' to convey that it would entertain further argument while the administrative review action (count I) was pending, and not that it wished to preserve the claims (the count II declaratory action and the claims as against Riley) for refiling in the future."

¶ 34 While Liberty Mutual's brief does not contain any statement related to this court's jurisdiction to hear the appeal, Prate, on the other hand, contends that its appeal is from a final judgment under Rule 301 (Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). The appeal challenges both the circuit court's December 12, 2018 order, which dismissed its declaratory judgment count, and the final order of August 14, 2019, which affirmed the DOI's final order. Based thereon, Prate contends that this court has jurisdiction to hear its appeal.

¶ 35 We begin by noting that a reviewing court has a duty to *sua sponte* consider whether or not it has jurisdiction. *In re Estate of Young*, 2020 IL App (2d) 190392, ¶ 16. A challenge to our jurisdiction is a question of law. *JP Morgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 21. Questions of law are subject to *de novo* review. *Id.*

¶ 36 While Prate asserts that this court has jurisdiction based on entry of a final judgment in the circuit court, we find that such conclusion is not immediately clear on the face of the record. In this case, the circuit court previously granted the DOI's section 2-615 (735 ILCS 5/2-615 (West 2018)) motion to dismiss both a defendant and count II of the complaint without prejudice. Thus, we must consider the effect of the circuit court's December 12, 2018, dismissal order on the jurisdiction of this court.

¶ 37 We begin by noting that the DOI filed a section 2-615 motion to dismiss Hearing Officer Riley as an unnecessary party and Prate's declaratory judgment count (count II) for lack of subject matter jurisdiction. However, the DOI should have filed a section 2-619 (735 ILCS 5/2-619 (West 2018)) motion to dismiss. A section 2-615 motion allows for the dismissal of the complaint (or portion thereof) where the pleading is legally insufficient based on defects apparent on its face. 735 ILCS 5/2-615 (West 2018). Conversely, a section 2-619 motion to dismiss admits the

sufficiency of the complaint but asserts an affirmative matter acts to defeat the claim. 735 ILCS 5/2-619 (West 2018).

¶ 38 In this case, there were affirmative matters raised by the DOI that defeated portions of plaintiff's claims. With respect to count I, the DOI sought dismissal of Riley because he was not a necessary party to the administrative review action. With respect to count II, the DOI sought dismissal because the circuit court lacked subject matter jurisdiction to review a claim for declaratory judgment in an administrative review case. These matters should have been raised in a section 2-619 motion and were improperly raised in a 2-615 motion.

¶ 39 Ordinarily, the failure to properly designate a motion to dismiss would result in reversal if prejudicial to the nonmovant. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). However, in this case, because we find that the parties were not prejudiced by the mislabeling as will be further detailed below, in the interest of judicial economy, we will treat the improperly designated motion to dismiss as if it were properly designated when filed. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 379 (1994).

¶ 40 Turning our attention to the jurisdiction question, the Illinois Constitution provides for appellate jurisdiction to hear appeals from all final judgments entered in the circuit court. Ill. Const. 1970, art. VI, § 6. The Constitution also grants our supreme court the authority to provide by rule for appeals from less than final judgments. *Id.* Absent an applicable supreme court rule, this court may not exercise appellate jurisdiction over a judgment, order or decree which is not final. *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). Supreme Court Rules 301 and 304 provide the jurisdictional basis for appealing final judgments. *Lewis v. Family Planning Management, Inc.*, 306 Ill. App. 3d 918, 921 (1999).

¶ 41 Generally, an order of dismissal entered "without prejudice" is a nonfinal order and is not appealable. *Ally Financial Inc. v. Pira*, 2017 IL App (2d) 170213, ¶ 28. However, motions to dismiss that were granted without prejudice become part of the final ruling on the case when no interlocutory appeal is taken or where the order contains no Rule 304(a) (eff. Mar. 8, 2016) language. Thus, the circuit court's rulings on the DOI's motion to dismiss, even though granted without prejudice in the December 12, 2018, order, are final orders and are properly part of our jurisdiction over the final ruling in the case. See *Reed v. Retirement Board of the Fireman's Annuity and Benefit Fund of Chicago*, 376 Ill. App. 3d 259, 267 (2007) (once a final order has been entered in a case, all nonfinal orders previously entered may be reviewed by the appellate court).

¶ 42 Therefore, once the entire action terminated on August 14, 2019, Prate could file its notice of appeal for all orders entered by the circuit court. Accordingly, we find that we have jurisdiction over this appeal pursuant to Rule 301 (eff. Feb. 1, 1994), and turn to the merits of the appeal.

¶ 43 B. The DOI's Authority to Issue Its Order

¶ 44 Prate first contends that the DOI acted without authority when it issued its final order and therefore, the order is void. Prate argues that this court's decision in *CAT Express*, which was issued after Prate filed its notice of appeal, is dispositive. According to Prate, we held in *CAT Express* that the DOI did not have express or implied statutory authority to resolve a private dispute between an insurer and its insured, thereby making the DOI's final order void. *CAT Express*, 2019 IL App (1st) 181851, ¶ 35.

¶ 45 The DOI agrees with Prate's contention that under the authority of this court's decision in *CAT Express*, the DOI and ultimately the Director lacked general authority to resolve the parties'

dispute. Rather, the DOI's specific statutory authority is found in section 462 of the Act (215 ILCS 5/462 (West 2018)), and it applies only to disputes about the " 'application' of the NCCI's experience rating plan, classification system, and manual rules." Additionally, the DOI maintains that this court characterized the DOI's authority under the Act as specific and limited, which is not implicated just because the matter in dispute had some relevance to the rules. Thus, the DOI concludes that the decision cannot stand.

¶ 46 Liberty Mutual, however, disagrees with the conclusion that *CAT Express* is dispositive of this appeal. Instead, Liberty Mutual contends that *CAT Express* is distinguishable from the present case because here the DOI's authority comes from section 462 of the Code (215 ILCS 5/462 (West 2018)), and not section 401 (215 ILCS 5/401 (West 2018)) as in the *CAT Express* case.

¶ 47 We disagree. Our review of *CAT Express* establishes that it is dispositive of the merits of this appeal. In *CAT Express*, the parties had an employment status dispute; we note that Liberty Mutual was also a defendant in that case. Similar to Prate, CAT Express applied to the Illinois Assigned Risk Plan for workers' compensation insurance coverage, and coverage was assigned to Liberty Mutual. *CAT Express*, 2019 IL App (1st) 181851, ¶ 1. CAT Express disclosed six clerical workers subject to workers' compensation coverage. *Id.* After a premiums audit, Liberty Mutual determined that CAT Express employed a substantial number of owner-operators that were not disclosed as employees. Liberty Mutual consequently determined that CAT Express owed $356,592 in additional premiums to cover the exposure related to the owner-operators. *Id.* CAT Express disagreed, arguing that its contracts with the owner-operators established an independent contractor relationship and not an employer-employee relationship. *Id.* CAT Express sought resolution of the issue from the NCCI, who determined that it had no jurisdiction over the dispute

and advised CAT Express to appeal to the DOI. *Id.* After a hearing at the DOI, the Director adopted the hearing officer's findings of fact, conclusions, and recommendations as follows: 1) Liberty Mutual correctly determined that CAT Express' owner-operators were employees rather than independent contractors, and 2) CAT Express was liable for the additional premiums. *Id.* The DOI denied CAT Express' motion for reconsideration, and the circuit court affirmed the DOI's order. *Id.*

¶ 48 CAT Express appealed, and this court subsequently ordered supplemental briefs from the parties on the issue of whether the DOI and the Director had authority to resolve the parties' dispute and to specifically address the applicability of section 462 of the Code (215 ILCS 5/462 (West 2018)). *Id*. at ¶¶ 2, 9. This court concluded that the DOI did not have express or implied authority to resolve the employment status dispute as it did not directly or indirectly involve the DOI's or the Director's authority to administer the insurance laws of this state. *Id.* We found that the DOI acted beyond its authority in conducting the hearing and issuing the final order. *Id.*

¶ 49 In reaching that conclusion, we noted that the parties, the DOI and the Director all acknowledged that the DOI did not have express authority to adjudicate employment status disputes under the Code. *Id.* at ¶ 10. The DOI and the Director, however, asserted that implied authority existed to adjudicate employment status disputes under sections 401, 402, 403 and 462 of the Code (215 ILCS 5/401, 5/402, 5/403, 5/462 (West 2018)), which was derived from section 401(c), which expressly allowed the Director to conduct hearings as may be "necessary and proper for the efficient administration of the insurance laws of this State," (*Id.* at §401(c)) and section 462, which provides for an appeal to the DOI from a decision by a rating organization rejecting a request for relief from "any person aggrieved by the application of its rating system (*Id.* at § 462).

CAT Express, 2019 IL App (1st) 181851, ¶ 10. Liberty Mutual agreed that the DOI's and the Director's authority was derived from section 401(c) of the Code as is noted in the Director's notice of hearing, and that section 462 was inapplicable to the outcome of the case. *Id.* at ¶ 11.

¶ 50 CAT Express argued that the DOI had concurrent jurisdiction with the Illinois Workers' Compensation Commission (Commission) over its dispute with Liberty Mutual and that under section 462, the NCCI was required to provide an opportunity to be heard. *Id.* at ¶ 12. However, ~~Once~~ the NCCI refused to provide assistance, and informed CAT Express that its recourse was to appeal to the DOI under section 462, which it did. *Id.* Further, CAT Express noted a conflict in the law, to wit: section 462 required that questions regarding the application of workers' compensation rates should be appealed to the DOI, while the NCCI's denial letter stated that the Commission determines whether an individual is an employee for workers' compensation. *Id.*

¶ 51 We disagreed with the parties' consensus that there was implied authority for the DOI to hear the dispute and found that neither section 401(c) nor section 462 applied. *Id.* at ¶13. We found that the DOI and the Director lacked express or implied authority to decide an employment status dispute or to issue a final order on the issue. *Id.*

¶ 52 As we noted in *CAT Express*, because administrative agencies are creatures of statute, they have no general or common law powers. *Goral v. Dart*, 2020 IL 125085, ¶ 33. The DOI, as an administrative agency, is limited to the powers granted to it by the legislature, and any actions taken must be authorized by its enabling statute. *Id.*; *Crittenden v. Cook County Comm'n on Human Rights*, 2013 IL 114876, ¶ 14. The agency is limited to those powers granted to it by the legislature in its enabling statute. *Julie Q. v. Department of Children and Family Services*, 2013

IL 113783, ¶ 24. The scope of powers conferred on an administrative agency by its enabling authority is a question of statutory authority which we review *de novo*. *Id.* at ¶ *20*.

¶ 53 We found that the dispute between CAT Express and Liberty Mutual was essentially an employment status dispute: whether owner-operators used by CAT Express were independent contractors or employees for the purposes of coverage under Liberty Mutual's workers' compensation policy. *CAT Express*, 2019 IL App (1st) 181851, ¶ 16. We concluded that nothing in the Code conferred express authority on the DOI to resolve such disputes and looked to the express provisions of the Code to decide if such authority was implied. *Id.*

¶ 54 We determined that the DOI lacked authority under section 401(c) of the Code and examined its provisions. Section 401 charges the Director with the rights, powers, and duties pertaining to the enforcement and execution of all the insurance laws of the state. 215 ILCS 5/401 (West 2018). Specifically, the Director has the power to: (a) make reasonable rules and regulations as may be necessary for making effective such laws; (b) conduct such investigations as may be necessary to determine whether any person has violated any provision of such insurance laws; (c) to conduct such examinations, investigations and hearings in addition to those specifically provided for, as may be necessary to administer the insurance laws; and (d) institute such actions or other lawful proceedings as may be necessary to enforce the Code or any order or action taken by him under the Code. 215 ILCS 5/401(a)-(d) (West 2018).

¶ 55 We made specific note that the parties "made no effort to describe, and [did] not explain how an employment status and premium dispute between an insurer and an insured involved 'the efficient administration of the insurance laws of this State' or whether the determination that someone is an employee for the purposes of workers' compensation insurance coverage is

regulated by the Insurance Code or by any regulation promulgated by the Director." *CAT Express*, 2019 IL App (1st) 181851, ¶ 20. We concluded that the language of section 401(c), although broad, did not vest the Director with express or implied authority to make factual determinations regarding the scope of coverage under any contract of insurance. *Id*. at ¶ 23. The DOI and the Director administer the insurance laws of this state and not individual insurance contracts between an insurer and an insured. *Id.*

¶ 56 We also concluded that section 462 was inapplicable as it did not provide implied authority for the DOI to hear an employment dispute between Liberty Mutual and CAT Express because the dispute did not involve the application of the NCCI's rating system. *Id.* at ¶ 25. In examining section 462, we determined that it required a rating agency, like the NCCI, to provide insureds, such as CAT Express, with information regarding any NCCI rate affecting an insured. *Id.* at ¶ 27. We found that section 462 limits the DOI's review to the final decision of the NCCI involving the interpretation or application of its experience rating plans, its classification system, or its manual rules, and noted that the NCCI expressly stated that it lacked jurisdiction because it does not act to decide employment status disputes. *Id.* at ¶ 31.

¶ 57 In finding that the DOI lacked implied authority, we noted that the parties were not left without a remedy, stating that employer-employee relationships are frequently decided in declaratory judgment actions filed in the circuit court, as well as scope of coverage actions *Id.* at ¶ 34. We concluded that the DOI acted without authority when it issued its final order and therefore, the final order was void. *Id.* ¶ 35. We vacated the DOI's final order and the circuit court's order that affirmed said order. *Id.*

¶ 58 The same result is warranted here. Despite Liberty Mutual's attempt to distinguish this case from *CAT Express*, we find that case to be dispositive of the present case. Here, the underlying dispute between Prate and Liberty Mutual was an employment status dispute: namely, whether Prate's subcontractor ARW LLC, who had no workers' compensation coverage, had employees that would trigger additional premiums under Prate's policy. We specifically reject Liberty Mutual's characterization of the issue in this case as simply an analysis of the NCCI's Basic Manual Rule 2-H, i.e., whether Prate furnished satisfactory evidence that the subcontractor had workers' compensation insurance in force. While it may be true that the final determination of how much additional premium is due would be calculated according to that rule, in order to reach that determination, there must be findings of fact and conclusions of law made to establish ARW LLC's status as an employer and if so, whether any of its employees completed work on Prate's projects. As we concluded in *CAT Express*, such determinations require the DOI and the Director to make factual findings regarding the parties' private interests in the scope of their insurance contract. No public interest or administration of any insurance law or regulation is implicated by the dispute at bar. As such, pursuant to sections 5/401(a)-(d) of the Act (215 ILCS 5/401(a)-(d) West 2018)), we conclude that the DOI and the Director were without express or implied authority to issue the final order, and that such order is void. Hence, we hereby vacate the DOI's final order and vacate the circuit court's order affirming the DOI's final order.

¶ 59 As noted by this court in *CAT Express*, Prate is not without remedy to have its issue addressed. A declaratory judgment action is the proper vehicle for resolution of the factual question raised, namely whether Prate's subcontractor, ARW LLC, which did not have workers' compensation insurance, had employees that worked on Prate's projects that trigged additional

premiums due under the Prate's policy with Liberty Mutual. *CAT Express*, 2019 IL App (1st) 181851, ¶ 34. See also *Brandt Construction Co. v. Ludwig*, 376 Ill. App. 3d 94, 104 (2007) (declaratory judgment action proper where an aggrieved party seeks judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where the agency cannot provide an adequate remedy).

¶ 60 C. The Circuit Court's Dismissal Order of August 12, 2018

¶ 61 Additionally, Prate seeks review of the circuit court's dismissal order entered on August 12, 2018. As noted earlier, the DOI sought, and the circuit court granted, dismissal of Hearing Officer Riley as an unnecessary party to the action and dismissal of the declaratory judgment count for lack of subject matter jurisdiction.

¶ 62 As discussed earlier, we will treat the DOI's motion to dismiss as a properly labeled section 2-619 (735 ILCS 5/2-619 (West 2018)) motion to dismiss. A section 2-619 motion to dismiss admits the sufficiency of the complaint but asserts an affirmative matter to defeat the claim. 735 ILCS 5/2-619 (West 2018). Our review of the grant of a motion to dismiss under section 2-619 is *de novo*. *Krilich v. American National Bank and Trust Co. of Chicago*, 334 Ill. App. 3d 563, 570 (2002). The question on appeal is whether the existence of a genuine issue of material fact that should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. *Id.*

¶ 63 Upon review of the record, we find no genuine issue of material fact that should have precluded the dismissal of Hearing Officer Riley as an unnecessary party in the administrative review action (count I). An employee, agent, or member of an administrative entity is not a party of record if he does not have statutory authority to make a decision adverse to the plaintiff. *Fayhee*

v. State Board of Elections, 295 Ill. App. 3d 392, 403 (1998). In this case, Hearing Office Riley made a recommendation but did not have authority to issue the order. We thus conclude that the circuit court properly granted the dismissal of Hearing Officer Riley as a party.

¶ 64 The circuit court also granted the DOI's motion to dismiss Prate's declaratory judgment action (count II) for lack of subject matter jurisdiction. As a general rule, arguments, issues, and defenses not presented in an administrative hearing are procedurally defaulted and may not be raised for the first time before the circuit court on administrative review. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212 (2008). That is not the case here as Prate did raise the issue of Liberty Mutual's calculation of the specific premium due before the DOI.

¶ 65 However, the DOI concluded that it was unable to determine the specific amount of premium due. Such conclusion was correct as the Code does not grant the DOI specific or implied powers to resolve insurance contract fee disputes. See *CAT Express*, 2019 IL App (1st) 181851, ¶ 34. The authority of an administrative agency must derive either from the express language of the enabling act or by fair implication and intention from the express provisions of the act as an incident to achieving the objectives for which the agency was created. *My Baps Construction Corp. v. City of Chicago*, 2017 IL App (1st) 161020, ¶ 67.

¶ 66 Where the DOI lacked subject matter authority over Prate's issue related to the specific amount of premium due, it follows that the circuit court lacked authority to hear such matter as part of administrative review. See *Board of Education, Joliet Township High School District No. 204 v. Board of Education, Lincoln Way Community High School District No. 210*, 231 Ill. 2d 184, 206 (2008) (claims that are beyond the scope of the hearing officer and beyond the scope of the

administrative agency are therefore beyond the scope of the administrative review law). When an administrative agency is unable to provide a remedy, a party can seek judicial review of such issue in a separate declaratory judgment action. See *Brandt Construction*, 376 Ill. App. 3d at 104.

¶ 67 In this case, however, Prate did not file a separate declaratory judgment action, but instead included this issue as count II of its administrative review complaint. This was improper as such count was beyond the scope of the administrative review law. Accordingly, Prate must file such claim in a separate judicial proceeding. The motion to dismiss was properly granted for lack of subject matter jurisdiction by the circuit court.

¶ 68 CONCLUSION

¶ 69 In conclusion, we find that: (1) we have jurisdiction to hear this appeal as the nonfinal dismissal order became final and appealable once the final order was entered by the circuit court; (2) the DOI lacked statutory authority, to determine factual issues regarding additional premiums due under a workers' compensation policy, pursuant to our decision in *CAT Express*, 2019 IL App (1st) 181851; and (3) the circuit court properly granted the DOI's motion to dismiss based on affirmative matters that defeated Prate's claims.

¶ 70 For the foregoing reasons, we vacate the final order of the DOI in favor of Liberty Mutual, as it lacked authority to resolve the parties' dispute. We further vacate the circuit court of Cook County's order affirming the DOI's final order, as such order was void.

¶ 71 Circuit court judgment vacated.

¶ 72 Department order vacated.

National Council on Compensation Insurance

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Cynthia Rossetti
Prate Roofing & Installations
368 W. Liberty St., Suite F
Wauconda, IL 60054

June 2, 2016

Re: Workers Compensation Classification Dispute

Dear Ms. Rossetti:

This letter is to advise all interested parties of the decision made by the Illinois Workers Compensation Appeals Board (Board) as it concerns the dispute of Prate Roofing & Installations. The Board heard this dispute on Wednesday, May 25, 2016 at the Hilton Garden Inn, Chicago O'Hare Airport, Des Plaines, Illinois.

CASE SUMMARY & DECISION

Policy Information:

Carrier: Liberty Mutual
Policy Information: Policy # WC5 34S 540428 024, Effective 10/18/14
Market Type: Assigned Risk
Experience Rating Modification Effective 5/1/14 = .81

Issue in Dispute:
Prate was charged premium for payments made to subcontractor ARW. ARW underwent a name change in 2013, changing its name to Reliable Trade Services (RTS). NCCI issued an ownership name change ruling that continued the loss experience of ARW under the new name, RTS. RTS secured its first workers compensation policy under their new name effective 5/1/13, while ARW's last policy expired the same day, on 5/1/13.

Prate continued to make payment for services to ARW even after the name change, stating that the payments were issued to ARW because that was the name on the initial contract for service. Liberty included the payments made to ARW after 5/1/13 stating that ARW no longer had its own policy coverage as of that date.

Information in Support of the Insured's Position: Cynthia Rossetti, Michael Prate, Robert Beth, and Mike Gurpak represented Prate and provided the following information:

- ARW and RTS are the same company. All that occurred was a name change made in 2013. When the name was changed, NCCI issued a ruling that the two entities are combinable.
- ARW/RTS consistently had its own coverage during all periods that Prate used their services.
- The name change did not happen overnight. Many of Prate's contracts with ARW covered extended periods of time. If a contract was initiated under the name of ARW, it was fin under this name, even after they changed their name to RTS during the contract peri

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- Prate provided Liberty Mutual with a certificate of insurance naming both RTS and ARW. While the certificate listed ARW as an LLC, the LLC never conducted business. Business was only conducted by ARW, Inc. The type of business entity, LLC versus Inc., should not be used by Liberty Mutual as to claim ARW did not have coverage.
- Payments by Prate to ARW should be excluded because coverage for ARW existed under RTS' policy.

Information in Support of the Carrier's Position: Lisa Murphy represented Liberty Mutual and provided the following information:

- Although NCCI ruled that ARW and RTS are combinable for experience rating purposes, that does not mean the two entities were combined on a single workers compensation policy.
- After 5/1/13, ARW had no coverage under its name. Payments made by Prate to ARW after this date are correctly included under Prate's policy regardless of arrangements made between the companies involved.
- After 5/1/13, ARW was an uninsured subcontractor which created a potential exposure for Liberty Mutual.
- The certificate of insurance provided by Prate lists ARW, LLC. However, the services were provided by ARW, Inc. Without evidence that ARW, Inc. had its own coverage after 5/1/13, payments made to them after this date are correctly included under Prates policy.

Executive Session:

After reviewing the documents and testimony presented during the Board meeting, a motion was made, seconded and passed by majority vote, and it was

> **RESOLVED,** that the Board does not have sufficient information to rule on this dispute. The Board suggests Prate re-file its dispute with the Illinois Department of Insurance along with a copy of this letter.

In part, the Board opted not to issue a ruling because there were no policy declaration forms for either ARW or RTS provided during the meeting. The Board could not confirm or refute whether coverage existed for these entities. Further, the Board 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.

By copy of this letter to Liberty Mutual, they are advised of the Appeals Board's decision.

Notice of Right to Appeal

Pursuant to Article XXIX of the Illinois Insurance Code 215, any party affected by the action of the Appeals Board may, within thirty days after written notice of such action, appeal to the commissioner of insurance. Send the appeal, including copies of all supporting documents, to the Illinois Department of Insurance, at one of the following addresses:

1. 320 W. Washington St., Springfield, Illinois 62767, or
2. 100 W. Randolph St., Chicago, Illinois, 60601-3251.

You must also copy the insurance carrier if you file an appeal with the Department of Insuran
you do not file an appeal to the Department of Insurance within 30 days of the date of this le

your insurance carrier may proceed with any billing action that was held in abeyance while the board considered your dispute.

Prepared by Tim Hughes, NCCI, Inc.

Distribution:

Prate Roofing & Installation
Liberty Mutual

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE

IN THE MATTER OF THE WORKERS'
COMPENSATION INSURANCE
POLICY NO. WC5-34S-540426-024
ISSUED TO: PRATE ROOFING & INSTALLATIONS LLC
BY LIBERTY MUTUAL INSURANCE CORPORATION

HEARING: 16-HR-0558

ORDER

I, Jennifer Hammer, Director of the Illinois Department of Insurance, hereby certify that I have read the Record in this matter and the hereto attached Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer, Patrick D. Riley, appointed and designated pursuant to Section 402 of the Illinois Insurance Code (215 ILCS 5/402) to conduct a Hearing in the above-captioned matter and that I have carefully considered the Record of the Hearing and the Findings of Fact, and Conclusions of Law and Recommendations of the Hearing Officer attached hereto and made a part hereof.

I, Jennifer Hammer, Director of the Illinois Department of Insurance, being duly advised in the premises, do hereby adopt the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer as my own, and based upon said Findings, Conclusions and Recommendations enter the following Order under the authority granted to me by Article XXIV and Article XXXI of the Illinois Insurance Code (215 ILCS 5/401 *et seq.* and 215 ILCS 5/500-5 *et seq.*) and Article X of the Illinois Administrative Procedure Act (5 ILCS 100/10-5 *et seq.*).

This Order is a Final Decision pursuant to the Illinois Administrative Procedure Act (5 ILCS 100/1 *et seq.*). Parties seeking to petition the Director of Insurance for a Rehearing or to Reopen the Hearing pursuant to 50 Ill. Adm. Code 2402.280 must do so within 10 days of the mailing of this Order. Failure to exhaust administrative remedies may affect an appeal. Appeal of this Order is governed by the Illinois Administrative Review Law (735 ILCS 5/3-101 *et seq.*).

NOW IT IS THEREFORE ORDERED THAT:

1) That Liberty Mutual is entitled to the premium charges assessed to Prate Roofing regarding workers compensation policy number WC5-34S-540426-024.

2) That the costs of this proceeding is waived.

DEPARTMENT OF INSURANCE
of the State of Illinois

Date: 5/7/18

Jennifer Hammer /PTO
Jennifer Hammer
Director

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE

IN THE MATTER OF THE WORKERS'
COMPENSATION INSURANCE
POLICY NO. WC5-34S-540426-024
ISSUED TO: PRATE ROOFING & INSTALLATIONS LLC
BY LIBERTY MUTUAL INSURANCE CORPORATION

HEARING: 16-HR-0558

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE HEARING OFFICER

The above-captioned matter comes to the Director of Insurance as an Appeal of the Illinois Workers Compensation Appeals Board ("IWAC") by Prate Roofing pursuant to Sections 401, 402, 403, and 462 of the Illinois Insurance Code (215 ILCS 5/401, 5/402, 5/403, and 5/462). The purpose of this proceeding was to determine whether Liberty Mutual Insurance correctly applied the employer classification code to the Policyholder's Workers' Compensation Policy in accordance with the Illinois Workers' Compensation Act ("Act"). The parties waived their right to an in-person hearing and requested issues be determined by written submissions and exhibits. Having read and considered all the evidence and briefs offered, and having been fully advised in the premises, the Hearing Officer submits the following Findings of Fact, Conclusions of Law, and Recommendations to the Director of Insurance, Jennifer Hammer ("Director").

FINDINGS OF FACT

PROCEDURAL DOCUMENTS AND THE EVIDENCE

1) On June 2, 2016, the National Council on Compensation Insurance ("NCCI") informed the parties at issue that the Illinois Workers Compensation Appeals Board did not have sufficient information to rule on whether Liberty Mutual Insurance Corporation ("Liberty Mutual") improperly charged Prate Roofing & Installations ("Prate Roofing") for exposure to liability due to Prate Roofing's use of a possibly uninsured subcontractor. ("Liberty Mutual Exhibit K").

2) Patrick D. Riley was dul6y appointed Hearing Officer in this matter pursuant to Section 402 of the Code (215 ILCS 5/402).

3) On September 18, 2017, the Illinois Department of Insurance ("Department") received a Position Paper ("Position Paper") from Liberty Mutual that laid out legal and evidentiary claims to support their argument that Prate Roofing utilized a subcontracting entity which did not have proper workers compensation coverage. Included in this Position Paper are the affidavit of Lisa Murphy ("Lisa Murphy Affidavit"); the Department's ruling in the matter of workers compensation insurance issued to Central Terrace Cooperative, Inc., Hearing No. 15-HR-0904 ("Central Terrace"); and documents relating to workers compensation coverage issued to Prate Roofing, certificates of insurance for its subcontractors, and documents relating to the subsequent self-audit and external audit of Prate Roofing ("Liberty Mutual Exhibits C-O").

4) On October 10, 2017, the Department received Liberty Mutual's Trial Brief in response to Prate Roofing's Trial Brief ("Liberty Mutual's Response").

5) On October 12, 2017, the Department received a "Trial Brief and Motion for Summary Judgment" from Prate Roofing, in which it outlined its rebuttal of Liberty Mutual's Position Paper, in addition to offering exhibits concerning the balance of the post-audit policy payment due, letters from Reliable Trade Services to the Department, the NCCI, and Liberty Mutual, and an affidavit from Michael Prate ("Prate Trial Brief"; "Prate Exhibits 1-5"; "Prate Affidavit"). The Department also received Prate Roofing's Response to Liberty Mutual's Position Paper ("Prate Response"), which also included the affidavit of Michael Gurdak ("Gurdak Affidavit").

6) On November 6, 2017, the Department received a Sur-Reply Brief from Liberty Mutual that outlined its rebuttal to Prate Roofing's arguments and outlined its legal arguments concerning the corporate entities involved in the case ("Liberty Mutual Sur-Reply").

7) On November 6, 2017, Prate Roofing submitted its Reply in Support of Its Trial Brief, which included exhibits concerning the status of the various corporations involved in this matter, as well as tax returns, proofs of payment, and workers compensation coverage. ("Prate Roofing Reply"; "Prate Roofing Reply Exhibits 1-13").

TESTIMONY

8) Prate Roofing is a roofing and construction installations contractor and limited liability corporation in the State of Illinois (IL Corp. #04274806). (Prate Trial Brief, p. 2).

9) Cynthia Rosetti is listed as the Owner of Prate Roofing (Liberty Exhibit J), and Michael Prate describes himself as a former agent and officer of the entity and a current employee of Prate Roofing. (Prate Affidavit, Line 2).

10) ARW Roofing, Inc. ("ARW INC") (IL Corp. #67441621) was an Illinois company which entered into agreements with Prate Roofing for contracting services. (Gurdak Affidavit, Line 2). ARW INC was involuntarily dissolved in August 2015. (Gurdak Affidavit, Line 4). Reliable Trade Services, Inc. ("RTS") (IL. Corp. #69032028) is an Illinois corporation which also entered into contracts with Prate Roofing.

11) ARW Roofing, LLC ("ARW LLC") is a limited liability corporation (IL Corp. #03948188) which was organized by an entity known as the Emmolly Corporation, Inc. ("Emmolly"), of which Michael Prate claims to be President. (Prate Affidavit, Line 3). ARW LLC also entered into contracts with Prate Roofing during the policy period at issue.

12) According to Prate Roofing, from May 1, 2013 to May 1, 2014, ARW INC carried workers' compensation insurance. On August 1, 2013, RTS was formed and listed the same policy as its coverage, claiming that ARW INC underwent a "name change" to Reliable Trade Services. (Prate Trial Brief, p. 2).

13) In 2013, Prate Roofing sought and obtained workers' compensation insurance coverage from the Illinois Assigned Risk Plan, under which Liberty Mutual was assigned as its carrier. (Lisa Murphy Affidavit, Line 5).

14) In 2014, a renewal policy was issued to Prate Roofing (policy #WC5-34S-540426), effective from October 18, 2014 through June 28, 2015, which is the policy at issue. (Lisa Murphy Affidavit, Line 6).

15) In 2015, Prate Roofing was subject to both a self-audit and a premium audit performed by Liberty Mutual to determine if Prate Roofing had properly provided workers' compensation certificates for all of its subcontractors; Lisa Murphy was assigned as the auditor for Liberty Mutual's audit. (Lisa Murphy Affidavit, Lines 9-24).

16) During the self-audit process, it was found that Prate Roofing had made payments to RTS, ARW INC, and ARW LLC between October 18, 2014 and June 28, 2015. (Liberty Mutual Exhibit F).

17) Ms. Murphy testified that, while Prate Roofing produced a certificate of insurance for RTS, it did not present one for ARW LLC. (Lisa Murphy Affidavit, Lines 14-18).

18) Based upon these findings, Liberty Mutual argues that Prate Roofing utilized services from ARW LLC, which did not carry workers' compensation coverage, and thus exposed Liberty Mutual to liability, for which it assessed Prate Roofing an additional premium of $127,305.00. (Liberty Mutual Position Paper, p. 14).

19) Prate Roofing argues that, because ARW LLC had no employees, that entity could not perform work which would need to be covered under Illinois workers compensation law or the NCCI Basic Manual, and thus Prate Roofing did not expose Liberty Mutual to liability. Prate Roofing also argues that it would be improper to factor any payments to this entity into Liberty Mutual's premium calculations. (Prate Trial Brief, p. 4-6).

DISCUSSION AND ADDITIONAL FINDINGS

This matter comes to the Director of Insurance after the National Council on Compensation Insurance informed the parties at issue that the Illinois Workers Compensation Appeals Board ("Board") did not have sufficient evidence to determine whether Liberty Mutual improperly charged Prate Roofing regarding policy number WC5-34S-540426-024 for possible exposure due to use of an uninsured

subcontractor. Consequently, this matter comes as an appeal by Liberty Mutual of the Board's refusal to issue a ruling pursuant to Section 462 of the Illinois Insurance Code ("Code") which provides, in part:

> Any party affected by the action of [a] rating organization or [insurance] company on such request [for review of the application of its rating system] 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.

It is undisputed that Prate Roofing is a roofing and construction installation limited liability company which has contracted with several subcontracting entities. In 2013, Prate subcontracted with ARW INC. In August 2013, Prate Roofing then subcontracted with RTS, which listed the workers compensation policy utilized by ARW INC. During this period, Prate Roofing secured the workers compensation policy at issue with Liberty Mutual, which was also renewed in 2014. As part of the process for renewal of Prate Roofing's policy, Liberty Mutual conducted a routine audit to determine whether Prate Roofing utilized subcontractors that possessed proper workers compensation coverage. Prate Roofing produced a certificate of insurance showing that RTS already had its own workers compensation coverage. In the course of this audit, Liberty Mutual, through its auditor, Lisa Murphy, discovered that Prate Roofing also contracted with a separate entity, ARW LLC, for which Prate Roofing did not provide a certificate of coverage.

At issue is whether Liberty Mutual justifiably assessed Prate Roofing an additional premium for its use of services by ARW LLC, which it deemed an uninsured contractor. The central questions to be considered are as follows: (1) Did ARW LLC have a worker's compensation insurance policy during Prate Roofing's period of coverage at issue in this hearing? (2) Did ARW LLC have any employees who were required to be covered according to Prate Roofing's policy? (3) Did the arrangements between Prate Roofing and ARW LLC expose Liberty Mutual to workers compensation liability and subject Prate to an increased premium? (4) If Liberty Mutual was exposed to liability from ARW LLC, did Liberty Mutual appropriately use certain payments from Prate Roofing to ARW LLC as the basis for calculating the additional premium?

As to the first question, it is undisputed that ARW LLC did not have a worker's compensation insurance policy of its own during Prate Roofing's policy period of October 2014 – June 2015. A common pattern in the filings offered that initially complicates this determination is the conflation of ARW LLC with ARW INC. For instance, both parties refer to an NCCI ownership name change ruling regarding "a subcontractor ARW." Yet the NCCI, itself, did not define which ARW Roofing was the subject of its ruling. The NCCI further stated that "the Board could not confirm or refute whether the legal status issue of ARW being an LLC or an Inc. when work was performed had a bearing on the dispute." (Liberty Mutual Exhibit K). In August 2013, RTS was organized, and it obtained workers compensation insurance. (Liberty Mutual Exhibit F). According to Mr. Prate, Emmolly, of which he was the president and owner, organized ARW LLC for the purpose of purchasing ARW INC. (Prate Affidavit). Mr. Prate stated that the purchase did not ultimately occur, and he claimed in a second affidavit that Emmolly "signed over ownership" of ARW LLC to Mr. Gurdak. (Second Prate Affidavit). However, Mr. Prate also stated that Mr. Gurdak should have filed the documentation with the Secretary of State, indicating some ambiguity as to the status of ownership, yet confirming that ARW INC and ARW LLC were two separate organizations. (Second Prate Affidavit). The affidavits of Mr. Gurdak and

Mr. Prate, beyond providing contradictory evidence concerning ownership, as well as Prate's answers to Liberty Mutual's interrogatories repeatedly state the separate nature of the entities, and that Mr. Prate and Mr. Gurdak, along with Ms. Rossetti, were knowledgeable as to the status and business dealings of the entities. (Prate Affidavit; Gurdak Affidavit; Liberty Mutual Exhibit L). It is also notable that Prate Roofing's Response to Liberty Mutual's Position Paper included an affidavit by Mr. Gurdak. (Gurdak Affidavit). This would indicate that Mr. Gurdak was cooperating with Prate Roofing for its response, but he would likely have disputed the fundamental assertion that ARW INC and ARW LLC are separate entities if it were not true. However, there is no indication of such dispute, so it is safe to conclude that the two entities remained legally independent of one another despite common ownership or management.

Furthermore, although Mr. Prate claims that ARW INC and RTS are the same and are covered under the same workers compensation insurance policy, a letter from Thomas Low of the Beth & Rudnicki Insurance Agency, which was the insurance producer for Prate Roofing, noted that they "do not write any Workers Compensation coverage for ARW Roofing" without specifying which ARW Roofing. (Liberty Mutual Exhibit G). Based upon the statements of Mr. Gurdak and Mr. Prate, as well as the assurances by the workers compensation insurance producer, ARW LLC would not be covered under the policy for RTS. During Liberty Mutual's 2015 audit, Prate Roofing did not produce a workers compensation insurance certificate for ARW LLC. (Lisa Murphy Affidavit). Based on Prate Roofing's assertions that ARW LLC could not perform work that required coverage under Illinois workers compensation law or the NCCI Basic Manual, Prate Roofing has effectively acknowledged that ARW LLC did not have insurance coverage either by itself or in association with another entity during the policy period at issue.

As to the second question, Prate Roofing asserts that ARW LLC possessed no employees; instead, the laborers were supplied by RTS. (Prate Trial Brief p. 4). Mr. Prate also states in his first and second affidavits that ARW LLC had no employees; Mr. Gurdak noted in his own affidavit that he believed that ARW LLC had no employees. (First Prate Affidavit, Second Prate Affidavit, Gurdak Affidavit). In September 2015, Mr. Thomas Low of the Beth & Rudnicki Insurance Agency, the insurance producer for Prate Roofing, also stated, "ARW Roofing does not have any employees." (Liberty Mutual Exhibit G). Mr. Low's letter never expressly distinguishes between ARW LLC and ARW INC, but the timing of this letter – after ARW INC ostensibly had become RTS – makes it more likely that Mr. Low was referring to ARW LLC. However, because Mr. Low did not provide insurance to ARW LLC, it is not clear how he would have reliable knowledge about that entity's staffing. A telling admission was made by Ms. Cynthia Rossetti, president of Prate Roofing, when she sent a letter to Liberty Mutual that stated, "ARW Roofing, LLC and Reliable Trade Services, LLC are one and the same company," but also explained that ARW LLC and RTS would complete the unfinished contracts of the other. (Liberty Mutual Exhibit G). If ARW LLC and RTS would complete contracts for one another, this contradicts the assertion that only RTS provided employees, as it would be impracticable for a construction entity such as ARW LLC to complete projects for RTS without employees of its own. Thus, the assertions by Mr. Low and Ms. Rossetti indicate that ARW LLC was considered a separate entity for the purposes of workers compensation coverage, and that ARW LLC likely had employees to carry out contracts on behalf of Prate Roofing and/or RTS.

Most substantially, however, in Prate Roofing's own Reply in Support of Its Trial Brief, several documents list RTS at the top that appear to be proofs of payment by RTS to ARW LLC for workers

compensation payroll during the policy period at issue. (Prate Roofing Reply Exhibit 7). Payments for workers compensation payroll ostensibly indicate that ARW LLC had its own employees for which RTS covered the cost of exposure. Prate Roofing had the opportunity to provide an alternative explanation for these payments through interrogatories served by Liberty Mutual. However, in response to the interrogatory which asked Prate Roofing to "set forth all audit exposure payroll details disclosed by Reliable Trade Services, Inc. to its workers' compensation insurance carrier performed for Prate," Prate Roofing responded, "Unknown." (Liberty Mutual Exhibit L). In response to the interrogatory which requested, "In 2014 and 2015, please identify any and all payments from ARW Roofing, LLC to Reliable Trade Services, Inc.," Prate Roofing responded, "Unknown." (Liberty Mutual Exhibit L). Given that Mr. Gurdak had been given ownership of ARW LLC from Emmolly and was willing to cooperate with Prate Roofing by providing an affidavit for this hearing, and given that Ms. Rossetti was the owner of Prate Roofing, and given that Prate Roofing purported to have a basis for asserting that RTS supplied laborers to ARW LLC, it is dubious that no information could have been provided to Liberty Mutual through these interrogatories to substantiate that ARW LLC had no employees. Consequently, based on the records of workers compensation payments from RTS to ARW LLC and the lack of reliable evidence indicating that these payments were not intended to cover employees actually employed by ARW LLC, the Hearing Officer finds that ARW LLC had employees during the policy period at issue.

The third question, whether the arrangements between Prate Roofing and ARW LLC exposed Liberty Mutual to workers compensation liability, is at the crux of whether Prate Roofing was properly subject to an increased premium under Liberty Mutual's rating system after its audit. Prate Roofing and its subcontractors with employees are required to carry workers compensation coverage. The Illinois Workers Compensation Act ("Act") provides:

> Any one engaging in any business or enterprise...who undertakes to do any work enumerated therein, is liable to pay compensation to his own immediate employees in accordance with the provisions of this Act, and addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay compensation under this Act, or guaranteed his liability to pay such compensation. 820 ILCS 305/1(a)(3).

In reference to the above statute, if a subcontractor, such as ARW LLC, has employees but does not have the requisite workers compensation coverage, then a contractor, such as Prate Roofing, that engages the subcontractor to do work would be liable to pay compensation to the subcontractor's employees. *See id.* The Act further provides:

> Any employer, including but not limited to general contractors and their subcontractors, who shall come within the provisions of Section 3 of this Act...shall...Insure his entire liability to pay such compensation in some insurance carrier...Every policy of an insurance carrier, insuring the payment of compensation under this Act shall cover all the employees and the entire compensation liability of the insured... 820 ILCS 305/4(a)(3).

Because Prate Roofing's policy must cover "the entire compensation liability of the insured," and because Prate Roofing would be liable to pay compensation to ARW LLC's employees if ARW LLC lacked its own coverage, Liberty Mutual would be required by law to assume that liability under those circumstances. *See id.* Thus, Prate Roofing was required both to secure workers compensation coverage for itself as principal and to ensure that ARW LLC had coverage as a subcontractor if ARW LLC had employees while engaged by Prate Roofing during the October 2014 – June 2015 policy period. Based on the earlier findings that ARW LLC did have employees during this policy period but lacked its own coverage, the Hearing Officer finds that Liberty Mutual was exposed under Prate Roofing's policy to workers compensation liability from ARW LLC's employees.

The final issue is whether Liberty Mutual applied the proper standards in computing the increase in premium for Prate Roofing based on its discovery that it was exposed to workers compensation liability for ARW LLC employees. The contract language in the policy at issue states that the premium includes "payroll and other remuneration paid," which includes "the insured's direct employees" and "all other persons engaged in work that could make us liable." (Liberty Mutual Exhibit E). Under the Act, ARW LLC employees could have made Liberty Mutual liable, so it was proper to assess some amount of premium for them. Granted, Prate Roofing disputes Liberty Mutual's assertion that the coverage provided was also bound by the NCCI Basic Manual, specifically Rule 2-H, which states that "the contractor must furnish satisfactory evidence that the subcontractor has workers compensation insurance in force." (Prate Trial Brief p. 4). However, the binder of coverage initially issued to Prate Roofing states that "coverage is provided under the Workers Compensation Law of Illinois… in accordance with the Plan rules," and that coverage would be "afforded under the applicable Workers Compensation Insurance Plan developed or administered by NCCI." (Liberty Mutual Exhibit C). Therefore, Prate Roofing, itself, has contractually consented to the laws of Illinois and specific rules of the NCCI, which allow for the determination of a premium based upon uninsured subcontractors with employees engaged in work for the policyholder.

According to the policy-at-issue's provision regarding premiums, Liberty Mutual could only assess a premium "determined by multiplying a rate times a premium basis" which includes "payroll and all other remuneration paid or payable during the policy period for 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 of this policy." (Liberty Mutual Exhibit E). The policy further provides that "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." (Liberty Mutual Exhibit E). So, under the terms of the policy, Liberty Mutual could charge a premium based on the contract price for ARW LLC's services and materials for Prate Roofing during the policy period at issue, which would be reflected in Prate Roofing's payment to ARW LLC.

Despite these explicit provisions in the policy, Prate Roofing argues that it would be improper to factor any payments to ARW LLC into Liberty Mutual's premium calculations. (Prate Trial Brief, p. 4-6). However, given Prate Roofing's apparent inability to supply any payroll records for the ARW LLC employees (or, alternatively, to supply sufficient financial records from ARW LLC showing that all income, expenditures, assets, and liabilities were accounted for with no employees on payroll during the policy period at issue), practically speaking there is no other basis for estimating the applicable payroll and other remuneration for the employees. Furthermore, Liberty Mutual did not have a contractual or statutory right to audit ARW LLC directly to obtain those records. Under the Department's hearing *In*

the Matter of the Workers' Compensation Insurance Policy No. TARIL32058-03 Issued to: Central Terrace Cooperative Inc. by AmTrust North America and AmTrust Financial Company, Hearing No. 15-HR-0904, the Department found that an insurance company does not have the right or authority to audit subcontractors who are not subject to its policy to determine the exact risk of exposure. (Liberty Mutual Exhibit B). This decision was recently affirmed in *Central Terrace Coop., Inc. v. Illinois Dep't of Ins.*, No. 16-CH-11688 (Cook Co. Cir. Ct. Apr. 20, 2017). Therefore, under the terms of its policy, Liberty Mutual was permitted to use the contract price for services and materials as the basis for premium.

In *Central Terrace*, the Department found that workers' compensation premiums are typically "based on estimated payrolls and class codes determined at the beginning of the policy period." (Liberty Mutual Exhibit B). As described by Lisa Murphy, the person assigned by Liberty Mutual to carry out the audit of Prate Roofing, "the total payments made by Prate Roofing [to ARW LLC] was $300,673.56 – of which 10% was excluded for materials – resulting in a total of $270,606.20 being added to Prate Roofing's audited payroll exposure." (Liberty Mutual Exhibit A). A payment of $300,673.56 to "ARW" can also be found in Prate Roofing's "Profit & Loss" statement for the period between October 18, 2014 and June 28, 2015, which Prate Roofing sent to Liberty Mutual as part of its self-audit. (Liberty Mutual Exhibit F). In a letter sent to the NCCI by Liberty Mutual, Lisa Murphy stated that the additional premium was calculated according to Tables 1 and 2 of Rule 2-H of the Basic Manual, which provides for the additional premium to be calculated based on "not less than 90% of the subcontract price" for labor only. (Liberty Mutual Exhibit H). As previously stated, Prate Roofing was contractually bound to the Plan rules administered by the NCCI, which included the Basic Manual. Accordingly, Liberty Mutual permissibly used $270,606.20 – 90% of the total subcontract price between ARW LLC and Prate Roofing – as the estimated payroll for ARW LLC employees to serve as the basis for calculating the additional premium owed by Prate Roofing.

In summary, although Prate Roofing did provide adequate certificates of insurance for itself and RTS, it did not provide any such certificate for ARW LLC, and it appears that ARW LLC did not in fact have such coverage. Despite some ambiguous references to "ARW" or "ARW Roofing" that do not distinguish between ARW INC and ARW LLC, the evidence shows that RTS and ARW LLC were separate and distinct entities during the period in question. Furthermore, the payments made by RTS to ARW LLC for workers compensation payroll - and the absence of any contrary explanations and records offered in the interrogatories by Prate Roofing, which easily could have obtained the relevant information through Mr. Prate – indicate that ARW LLC likely did have employees during the policy period at issue. Because Prate Roofing made payments to ARW LLC for services during that same policy period, Prate Roofing was exposed to liability for ARW LLC employees engaged in those services. Pursuant to the Act, Liberty Mutual was required to assume that liability under its policy with Prate Roofing. Finally, because of this additional liability, and because no actual payroll records were provided for ARW LLC employees, Liberty Mutual properly applied the NCCI Basic Manual's rule to use at least 90% of the $300,673.56 in total contract payments from Prate Roofing to ARW LLC as the basis for calculating the additional premium owed by Prate Roofing for workers compensation liability from ARW LLC employees.

Therefore, based upon a preponderance of the evidence and upon consideration of the Record as a whole or such portion thereof as may be supported by competent material and substantial evidence, in this instance Liberty Mutual's application of its rating system to the policy at issue should be upheld.

CONCLUSIONS OF LAW

1) Patrick D. Riley was duly and properly appointed as Hearing Officer in this matter pursuant to Section 402 of the Code (215 ILCS 5/402).

2) The Director of Insurance has jurisdiction over the subject matter and the parties to this proceeding pursuant to Sections 401, 402, 403, and 462 of the Code (215 ILCS 5/401, 5/402, 5/403, and 5/462).

3) Liberty Mutual properly chose to utilize the payments Prate Roofing had made to ARW LLC for work performed by the latter for the purpose of determining Prate Roofing's premium due under Liberty Mutual workers compensation policy number WC5-34S-540426-024.

RECOMMENDATIONS

Based upon the above stated Findings of Fact, Conclusions of Law, and the entire Record in this matter, the Hearing Officer offers the following Recommendations to the Director of Insurance:

1) That Liberty Mutual is entitled to the premium charges assessed to Prate Roofing regarding workers compensation policy number WC5-34S-540426-024.

2) That the costs of this proceeding be waived.

Respectfully submitted,

Date: 3-27-18

Patrick D. Riley
Hearing Officer

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE

IN THE MATTER OF THE WORKERS' COMPENSATION INSURANCE POLICY ISSUED TO PRATE ROOFING & INSTALLATIONS, LLC BY LIBERTY MUTUAL INSURANCE CORPORATION, POLICY NO. WC-34S-540428-024

HEARING: 16-HR-0558

ORDER

WHEREAS, this matter comes before the Illinois Department of Insurance pursuant to a decision of the Illinois Workers Compensation Appeals Board ("Board") that it did not have sufficient information to rule on the allegation by Prate Roofing, LLC ("Prate Roofing") that it was aggrieved by the action of Liberty Mutual Insurance Corporation ("Liberty") in conducting a Workers' Compensation Premium Audit pertaining to the business activities of Prate Roofing. The purpose of the initial hearing was to determine whether Liberty Mutual correctly applied the employer classification code to the Policyholder's Workers' Compensation Policy in accordance with the Illinois Workers' Compensation Act; and

WHEREAS, the Department received filings by Liberty and Prate Roofing to determine whether Prate Roofing's use of ARW Roofing LLC ("ARW LLC"), along with its use of Reliable Trade Services Inc. ("RTS") and ARW Roofing, Inc. ("ARW Inc."), exposed Liberty to liability through lack of workers' compensation coverage; and

WHEREAS, on May 7, 2018, the Director, Jennifer Hammer, issued her Final Order, which ratified and adopted the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer, Patrick D. Riley, as her own. Based upon a preponderance of evidence at the hearing, the Final Order affirmed that Prate Roofing is liable for an additional premium amount. The Final Order was mailed to the parties, via first class and Certified Mail, on May 7, 2018; and

WHEREAS, on May 15, 2018, Prate Roofing caused to be filed with the Department a Motion for Rehearing on their behalf pursuant to 50 Ill. Adm. Code 2402.280; and

WHEREAS, Section 2402.280, Title 50 of the Illinois Administrative Code states, in pertinent part:

Section 2402.280 Rehearings

a) Except as otherwise provided by law, and for good cause shown, the Director may in his discretion, order a rehearing in a contested case on petition of an interested party.
b) Where the record of testimony made at the hearing is found by the Director to be inadequate for purposes of judicial review, the Director may order a reopening of the hearing.
c) A motion for a rehearing or a motion for the reopening of a hearing shall be filed within 10 days of the date of mailing of the Director's Order...

50 Ill. Adm. Code 2402.280.

WHEREAS, Prate Roofing's Motion for Rehearing, received by the Department on May 15, 2018, was timely filed; and

WHEREAS, Prate Roofing has failed to demonstrate good cause or legally sufficient grounds to reopen the matter. In its petition, Prate Roofing posits that the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Officer: (1) "erroneously overlooked undisputed affidavit testimony and misinterpreted documents attached to said affidavits... [which the Director] would have needed to conclude that Liberty was not entitled to additional premium because Prate's use of ARW LLC did not expose Liberty to workers' compensation liability," and (2) "erroneously overlooked uncontroverted facts that the total amount of labor provided on Prate projects was only $44,140.25, meaning the most Liberty was entitled to charge in additional premium was $20,304.52, not $127,305.00"; and

WHEREAS, Prate Roofing has not offered satisfactory explanations to counter the Department's conclusion that ARW LLC possessed employees, and was thus liable to Liberty for additional workers compensation coverage. In its analysis, the Department carefully examined the evidence offered by both parties, including repeated citation of Prate Roofing's affidavits. Despite Prate Roofing's position, the evidence presents a convoluted, and often contradictory picture of Prate Roofing's dealings with its subcontractors RTS and ARW LLC. Prate Roofing has offered no evidence, beyond conclusory statements, for these discrepancies, and insisting on the veracity of its evidence at face value to the exclusion of contradictory evidence presented by it to the Department; and

WHEREAS, the Department further finds that Prate Roofing has offered no evidence that Liberty incorrectly calculated the additional premium. Prate Roofing has not refuted that it was subject to the NCCI's Basic Manual for workers compensation coverage. Prate Roofing has offered no evidence contradicting the assertion that Liberty calculated the additional premium according to Tables 1 and 2 of Rule 2-H of the NCCI's Basic Manual, which was the contract price for ARW LLC's services and materials for Prate Roofing. And Prate Roofing has offered no evidence that Liberty utilized any other standard to calculate a premium charge but the information tendered to Liberty through the auditing process. It is not for the Department to determine the

specific amount of the premium charge, but that the parties under contract conduct themselves within the statutory and regulatory bounds of Illinois law; and

WHEREAS, Petitioner asserts conclusory statements on the weight of the evidence and application of law, but has not provided evidence that would alter the analysis upon which the Final Order rests. These matters which were the basis for affirming Liberty's premium audit remain unchallenged, and the Respondent's instant assertions do not show good cause pursuant to 50 Ill. Adm. Code 2402.280; and

WHEREAS, the Director having been fully advised in the premises;

IT IS HEREBY ORDERED that the Respondent's Motion for Rehearing fails to show a good cause basis for rehearing; and, furthermore, the record of testimony is adequate for purposes of judicial review; and therefore, the Respondent's Motion for Rehearing is **DENIED.**

DEPARTMENT OF INSURANCE
of the State of Illinois

DATE: 7/10/18

Jennifer Hammel PTD
Jennifer Hammer
Director

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Prate Roofing
v.
Liberty Mut Ins Co

No. 2018 CH 9826

ORDER

This matter coming before the Court for Administrative Review, due notice having been given and the Court being fully advised,

IT IS HEREBY ORDERED:

The Orders entered by the Illinois Department of Insurance on 5/7/18 and 6/7/18 are affirmed for the reasons stated on the record.

Attorney No.: 49706
Name: Kulen
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City/State/Zip: Chicago, IL 60601
Telephone: 847 875 8245

ENTERED: Judge Caroline Kate Moreland
Dated: AUG 14 2019
Circuit Court 2033
Judge
Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT

COOK COUNTY, ILLINOIS

PRATE ROOFING AND INSTALLATIONS, ET AL.

Plaintiff/Petitioner

Reviewing Court No: 1-19-1842
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Trial Judge: CAROLINE KATE MORELAND

v.

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Defendant/Respondent

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Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

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