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.	)	

REPLY BRIEF OF DEFENDANT-APPELLANT LIBERTY MUTUAL INSURANCE CORPORATION

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ARGUMENT

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

A. Reply to the Department's Arguments

The Department contends that there is no jurisdiction. However, the Department's arguments as to why there is no jurisdiction differ substantially from the Appellate Court's opinion. The Appellate Court believed that "the underlying dispute between Prate and Liberty Mutual was an employment status dispute" (like the prior ruling in *CAT Express, Inc. v. Muriel*). See *Prate Roofing & Installations, LLC v. Liberty Mut. Ins. Corp.*, 2021 IL App (1st) 191842-U, ¶58. The Department does not make this contention, but instead comes up with entirely new arguments to deny jurisdiction. Liberty Mutual respectfully submits that these new arguments do not withstand scrutiny.

The Department's first argument is that the "plain language" of Section 462 authorizes the Department to resolve disputes "only about the interpretation of the NCCI's rules." (Department's Brief, page 13). This is an incorrect statement of the law that is unsupported by the "plain language" of the statute – because Section 462 does not speak to disputes about the "*interpretation*" of rules at all. (Emphasis added). Rather, the "plain language" of Section 462 explicitly speaks to disputes where an insured has been "aggrieved by the *application*" of a rating system. See 215 ILCS 5/462 (emphasis added).

To get around the fact that the word "interpretation" is never used in Section 462, the Department argues that the word "application" (as in "any person aggrieved by the *application* of its rating system") actually means "interpretation." To this end, the Department relies on circular logic and points to examples that have nothing whatsoever to

do with Section 462 (e.g., how the word is used in the context of standard of review). The Department's word games fall well short of the mark – and even the Department agrees that "the best evidence" of a statute's intent is the "plain and ordinary meaning" of the language. Here, it is clear that Section 462's use of the word "application" was intentional. On its face, Section 462 exists to provide an insured the opportunity to have a hearing where "the manner in which such rating system has *been applied* in connection with the insurance afforded him" is reviewed. 215 ILCS 5/462 (emphasis added).

Indeed, the Appellate Court in *CAT Express* correctly understood the language of Section 462 to explicitly mean that the Department has jurisdiction to hear "grievances about the 'interpretation or application' of the NCCI's 'experience rating plans, its classification system,' and 'its manual rules.'" *CAT Express, Inc. v. Muriel*, 2019 IL App (1st) 181851, ¶31. Similarly, in *Travelers v. Ultimate Logistics*, the Idaho Supreme Court pointed out the error in the Department's reasoning on this issue. As the Court explained, such an approach (as is argued here by the Department) "would be to read the words 'the application of' out of the statute altogether." *Travelers Insurance Co. v. Ultimate Logistics, LLC*, 467 P.3d 377, 385 (2020). Clearly, the Department's proposed approach would not comport with the "plain language"of the statute. In short, the notion that Section 462 only applies to the "interpretation of the NCCI's rules" is plainly incorrect.

The Department next claims that "a person cannot be aggrieved by application of rules that were correctly interpreted." (Department's Brief, page 18). This is a meaningless statement, and it is unsupported by the Department's citation to *CAT Express*. Moreover, the Department begs the question when it states "If there is no dispute about the meaning of the

rules, then the insured must have been aggrieved by some other element of the process of calculating the premium, such as a finding of fact." Whatever exactly this statement may mean, it is clear here that there are explicit disputes about the meaning of the Basic Manual Rules. For example, there is Prate's dispute about how premiums should be calculated for its uninsured subcontractors. Liberty Mutual contends that per Rule 2-H.2 – Subcontractor Table 2, the "minimum to calculate additional premium is...Not less than 90% of the subcontract price." (C 209, ¶28 and C 385-386). In *contra*, Prate argues that Liberty Mutual was wrong to calculate "premium based upon the full contract price," (C 456) and that those rules (i.e., NCCI Basic Manual Rule 2-H.2 – Subcontractor Table 2) do not apply to it.

Incidentally, Liberty Mutual's view also comports with the decision made in *CAT Express*, where the Court found a lack of jurisdiction because the insured "did not raise any issue with Liberty's application of the NCCI's rating system to CAT's payroll...or that the applicable premium was incorrect." *CAT Express*, ¶32. Thus, while those issues were absent in the *CAT Express* case, they are clearly present in this case. Consequently, the Department's analysis is, in effect, a rejection of the *CAT Express* opinion.

The Department caps off its arguments about "application" and "interpretation" by making the sweeping assertion that any case "where the dispute includes issues of fact or statutory interpretation instead of or in addition to issues involving interpretation of the rules" must be resolved by the courts. (Department's Brief, page 22). It is fair to say that such an approach would render Section 462 meaningless. In other words, what the Department is saying is that an insured would be unable to use Section 462 to dispute any premium charge (even one about "the application of an experience rating plan, a

classification system, or any NCCI manual rules") if either party raised a dispute about even a single fact. Respectfully, this is a nonsensical result – especially when Section 462, on its face, envisions that both the Appeals Board and the Department will hold hearings on the insured's dispute.

Next (and as an alternative to its claim that Section 462 cases must be about the interpretation of the NCCI Manual Rules), the Department argues that Liberty Mutual "fails to call into question whether the dispute in this case was about 'application' of the NCCI's rules." (Department's Brief, page 24). This is not a serious argument. As previously stated by Prate, "Liberty's audit relies primarily upon Rule 2-H of the NCCI Basic Manual." (C 451). In *contra*, the Department conveniently claims that "Prate's prior characterization of the dispute is immaterial." Be that as it may – what about the Department's own prior characterization of the case? When this case was pending before the Circuit Court on Administrative Review, the Department throughly analyzed the relevant Manual Rules and explained (with approval) exactly how Liberty Mutual applied Rule 2-H in assessing the premiums to be charged to Prate. Citing directly to Tables 1 and 2 of Basic Manual Rule 2-H, the Department's attorneys argued "Liberty Mutual appropriately used certain payments from Prate Roofing to ARW as the basis for calculating the additional premium." (C 643-645). That analysis was correct then and it is correct now – the only thing that has changed is the Department's view.[1]

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[1] The Department's views on jurisdiction have been notably inconsistent. When *CAT Express* was pending on appeal, the Department argued that Section 462 was so broad that even a case about whether someone was an employee or independent contractor would fall within the statute's scope. See *CAT Express*, at ¶10. Now the Department believes that Section 462 is so narrow that the presence of even a single issue of fact must deprive the Department of

Moreover, when the Department asserts that "Liberty does not explain why this dispute falls within section 462" – this Honorable Court should recognize that the Department is being obtuse. Liberty Mutual has said it before, and will say it again: Section 462 provides the Appeals Board and the Department with administrative jurisdiction to hear cases concerning "the application of an experience rating plan, a classification system, or any NCCI manual rules." *CAT Express*., at ¶31. Here, this case is about whether Liberty Mutual complied with NCCI Basic Manual Rule 2-H when it assessed premiums for Prate's uninsured subcontractor. Thus, this case falls within the statutory jurisdiction arising under Section 462.

Apparently, the Department also believes it has caught Liberty Mutual in a contradiction because it previously recognized the importance of the question of whether ARW "had employees that required coverage by Prate's policy or required some sort of certificate of insurance." (Department's Brief, page 26). This *gotcha* moment is not what the Department thinks it is. The Manual Rule in question (Rule 2-H.2) provides that "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). Thus, the question of whether ARW had employees is of course important when deciding whether Liberty Mutual properly applied Rule 2-H.

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jurisdiction. In *contra*, Liberty Mutual has been consistent on its view of jurisdiction. At the time of *CAT Express*, Liberty Mutual argued that Section 462 would not cover an employment status dispute and the Court agreed. *Id*. at ¶11-12. Though it advocated for a broader reading of Section 401, Liberty Mutual believed, and continues to believe, that *CAT Express* correctly found that a case under Section 462 must concern "the application of an experience rating plan, a classification system, or any NCCI manual rules." *Id*., at ¶31.

To restate, it must be remembered that although Section 401 (per *CAT Express*) does not create an independent jurisdictional basis for resolving premium disputes, if jurisdiction does exist elsewhere (as it does here under Section 462) then the Department is well within its authority to hold a hearing and resolve factual questions – including the factual question of whether ARW Roofing had employees. 215 ILCS 5/401. [2]

In *contra*, the Department states that the Insurance Code "does not require the Department to make findings of fact or reach conclusions on statutory interpretation in this context because section 462 is not designed to provide the parties, or even the insured with full relief in connection with disputes over workers' compensation insurance premiums." (Department's Brief, page 21). The problem with this assertion is that the Department's hearings are expressly governed by the Illinois Administrative Procedure Act. See 215 ILCS 5/407.1. As such, the Department is required to include findings of fact and conclusions of law in its final decision. See 5 ILCS 100/10-50(a). Moreover, there simply is no legal basis for the assertion that the Department's role is limited to providing "an informed and authoritative interpretation of the NCCI's rules." [3]

The Department also argues that Section 462 could not have been intended as a mechanism for resolving "all issues in dispute between insured and insurer over the amount

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The Department thinks it is "strange" and "inefficient" for the Appeals Board to be asked to hear cases. Liberty Mutual would disagree. But whatever one's opinion, same would be an issue to take up with the legislature – it is not a legal argument against jurisdiction under Section 462.

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The Department's brief repeatedly cites to the NCCI's website. While that website is certainly a helpful guide for someone looking for information, it is not legal authority. It certainly does not override the statutory provisions of the Illinois Insurance Code.

of premiums" because, amongst other things, there is not an "enforcement" procedure built into Section 462. (Department's Brief, page 22). First, of course, no one is claiming that Section 462 was intended to resolve "all issues" concerning premium disputes. Rather, only disputes concerning the application of the rating system (as defined by *CAT Express*) are governed by Section 462. Second, as the Department notes elsewhere, the entire point of using Section 462 is to resolve issues concerning the application of the rating system administratively. To the extent that a party needed to enforce a ruling in Circuit Court it would be able to do so easily under the doctrine of administrative *res judicata*. No one is seeking to change the essential nature of an administrative action vs. a common law court.

The Idaho Supreme Court demonstrated that resolving disputed questions of fact was perfectly appropriate when determining whether Basic Manual Rule 2-H had been correctly applied. See *Travelers Insurance Co. v. Ultimate Logistics, LLC*, 467 P.3d 377 (2020). Indeed, the Idaho Department of Insurance had to answer essentially the same factual question presented in this case: i.e., did the uninsured subcontractor have any employees?

The Department tries to distinguish *Travelers* on several grounds. "For starters," the Department states that the challenge in the *Travelers* case "rested on an argument that the Idaho Insurance Code 'only grant[ed] the Department authority to determine 'whether a "filing"' fails to meet the requirements of the law.'" (Department's Brief, page 28). As such, the Department contends that the question of whether a limitation exists for only the "interpretation of the relevant rules" was not addressed. This is plainly wrong. The *Travelers* Court made clear that the insurance code "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. There is no doubt that the Court did not believe a limitation existed only for the interpretation of the rules.

In an immediate fallback, the Department also claims that even if the same arguments were "addressed and rejected" in *Travelers* (as they were), that opinion should be rejected as not "persuasive." However, the Department does not cite a different case that it finds *more persuasive* on this issue. Ultimately, it is the Department's objections, not the *Travelers* Court, which are not persuasive.

The Department contends that in *Travelers* the Idaho Supreme Court "did not thoroughly consider the language and context of the statute that is the Idaho analog to section 462." (Department's Brief, page 29). This is plainly not true. The *Travelers* Court extensively discussed the language of each of the relevant statutes (which are essentially identical to the statutes present in Illinois) as well as the interplay between the statutes.

In addition, the Department argues that "the Idaho court's reasoning was erroneous." (Department's Brief, page 29). Specifically, the Department objects to the fact that the Court did not agree with its view that the word "application" is the same as the word "interpretation." And indeed, the Court clearly rejected such arguments. *Travelers*, 467 P.3d at 385. Unlike the Department's tortured use of the statutory language, the *Travelers* Court clearly found that the statute's use of the word "application" in the phrase "aggrieved by the application of its rating system" was not an accident. Rather, it arose from the legislature enacting language that "plainly provides for the type of review that occurred in this case." *Id*. The Department's repeated insistence that "application" actually means "interpretation" is baffling. The Department believes that if the word "application" actually meant

"application," then the phrase "aggrieved by" would be rendered meaningless and "have no limiting function." However, this argument ignores the fact that the statute already has a limiting function built into it with the phrase "aggrieved by the application of its rating system." See 215 ILCS 5/462 and I.C. § 41-1622(2). It is the requirement that the case concern the application of a "rating system" that serves as a limiting function. That is why a dispute about whether truck drivers are employees or independent contractors is not permitted under Section 462. *CAT Express*, at ¶31. The case must concern "the application of an experience rating plan, a classification system, or any NCCI manual rules." *Id*.

Moreover, the Department also objects to the *Travelers* case because, "the Idaho court's determination of intent relied in part on a statement of purpose in the Idaho Insurance Code that the Illinois Insurance Code does not contain." (Department's Brief, page 30). This is grasping at straws. There is absolutely no indication that the *Travelers* Court "relied" on the phrase "To provide for *review by the state* of such rate-making and *the results thereof*." (Emphasis in the Department's Brief). Indeed, apart from acknowledging the existence of the phrase, it is never mentioned again. Moreover, while it is true that the "Declaration of Policy – Purpose" section of the Idaho Code (I.C. § 41-1602) is not identical to the language contained in the "Purpose of Article" section of the Illinois Insurance Code (215 ILCS 5/454), both statutes speak to protecting the public welfare vis-a-vis insurance rates. While the Idaho Code speaks to the "results" of rate making, the Illinois Code speaks to ensuring that those rates are not "erroneously applied." The intent is the same.

Lastly, in what it calls "the final analysis," the Department contends that Section 462 only applies to "disputes about interpretation of the relevant rules and not to every issue that

may arise concerning calculation of insurance premiums." (Department's Brief, page 31). Once again, no one is arguing that Section 462 applies to "every issue" concerning the calculation of insurance premiums. However, where there is a dispute about the application of an NCCI Basic Manual Rule (as there is here), an insured has a statutory right to resolve the case through administrative channels.

When the Department, through the Attorney General, argues against jurisdiction, it does so without regard to the statutory and administrative system Illinois has put in place. The statutes and the rules are intended to work together and to provide for resolution of workers' compensation matters.

Illinois law requires virtually all businesses to have workers' compensation insurance coverage. 820 ILCS 305/4(a)(3). For those who are unable to obtain coverage on their own, the Illinois Assigned Risk Plan "provides a method for employers to obtain workers' compensation insurance coverage through the residual market." *LM Ins. Corp. v. B&R Ins. Partners, LLC*, 2016 IL App (1st) 151011, ¶4. Prate sought and obtained coverage through the Assigned Risk Plan, and Liberty Mutual was assigned to provide coverage. (C 204).

In Illinois, as in other states, the NCCI serves as administrator of the Assigned Risk Plan. *Id*. In its role as the administrator, the NCCI is responsible for developing and filing "its Plan and associated rates, rating plans, rules, forms and manuals." 50 Ill. Adm. Code 2904.40. The NCCI, as the licensed rating organization in the State of Illinois, is also required to file with the Director of the Department of Insurance "every manual of classification, every manual of rules and advisory rates, every pure premium which has been fully adjusted and fully developed, every rating plan and every modification of any of the

foregoing which it intends to recommend for use to its members and subscribers." 215 ILCS 5/457(2).

All assigned carriers are required to act "in accord with the Manuals of Rules and Rates" filed by the NCCI (see 50 Ill. Adm. Code 2904.190), and the policy issued to Prate provides that premiums will be determined based on the "Manual of Rules, Classifications, Rates and Rating Plans." (C 271). Illinois has authorized dispute resolution procedures for those insureds "aggrieved by the application of its rating system." 215 ILCS 5/462. Since premiums are derived from rates and rating plans, insureds that dispute premiums (based on the manual of rules, classifications, rates and rating plans) "are aggrieved by the application" of the rating system. Therefore, Section 462 provides a procedure for premium disputes.

Based on the above, it is clear that the legislature intended for insureds to have an administrative forum to resolve certain types of premium disputes. The Illinois Workers' Compensation Commission is not that forum (as the dispute is not about benefits). *CAT Express*, at ¶33. Rather, the legislature explicitly intended for these cases (i.e., disputes about the "application" of the NCCI's rating system, including how the Manual Rules are applied) to proceed before the Appeals Board and the Department of Insurance. 215 ILCS 5/462.

B. Reply to Prate's Arguments

While Prate seeks the same end result as the Department, Prate does not rely upon the Department's arguments regarding jurisdiction (i.e., that the case must be about the "interpretation" not "application" of the relevant Manual Rules). Instead, Prate's arguments focus on its contention that this case is "an employment status dispute." This is an attempt by Prate to try and define this case as outside of the Department's jurisdiction.

However, in the context of what *CAT Express* was discussing, an "employment status dispute" is a common law case about whether certain workers should be classified as "employees or independent contractors...for purposes of calculating workers' compensation insurance premiums." *CAT Express*, ¶2. That is not the issue in this case. Rather, as discussed above, this case is about whether Liberty Mutual complied with applicable NCCI Basic Manual Rules when it charged premiums for one of Prate's uninsured subcontractors. Prate's rationale for labeling this case as "an employment status dispute" is based on the claim that its uninsured subcontractor (ARW Roofing) did not actually have employees. But that is not an "employment status dispute." It is simply a defense to the claim that Liberty Mutual properly applied NCCI Basic Manual Rule 2-H. Moreover, the fact that Prate's defense was heard (and rejected) by the Department when considering Rule 2-H does not mean that the case suddenly ceased to be about the application of the Manual Rule.

Prate also claims that this case is like *CAT Express*, because "the NCCI did not rule on Prate's original dispute," but instead stated "that it had insufficient information to determine the issue presented." (Prate's Brief, page 8). However, and unlike in *CAT Express*, the Appeals Board here did not believe it lacked jurisdiction to resolve the dispute. Rather, what the Appeals Board lacked was sufficient information on the actual insurance coverage for Prate's uninsured subcontractors ("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."). (C 120). In other words, Prate failed to produce necessary information to the Appeals Board regarding coverage for its subcontractors. Prate's refusal to submit meaningful evidence should not have resulted in

a "no decision," but rather should have resulted in a decision in favor of Liberty Mutual. Regardless, the fact that the Appeals Board declined to rule does not invalidate jurisdiction. See 215 ILCS 5/462. And, of course, ultimate resolution of the question of jurisdiction does not lie with the Appeals Board but rather with this Honorable Court.

Prate also misreads *CAT Express* when it claims that the Department "did not have express or implied statutory authority to resolve a private dispute between an insurer and insured and therefore, the DOI's final order was void." What Prate misunderstands is the distinction between the Department's authority under Section 401 and its authority under Section 462. In *CAT Express*, the Appellate Court held that Section 401 does not give the Department authority to rule on a private dispute between an insurer and an insured. *CAT Express*, at ¶22. However, that was not the ruling for Section 462.

A dispute raised under Section 462 is, almost by definition, a private dispute between an insurer and an insured. Whether the dispute concerns the application of an experience modification factor, the assignment of a classification code, or (as here) a dispute about the application of a Basic Manual Rule, all disputes under Section 462 are examples of an insured claiming to be aggrieved by the insurer. These examples would all be private disputes, and they would all be permitted under the statutory language of Section 462 – as expressly noted by *CAT Express*.

Prate's Response Brief also tries to distinguish the case of *Travelers Insurance Co. v. Ultimate Logistics, LLC*.

First, Prate argues that the *Travelers* decision "is in no way binding on this court." (Prate's Brief, page 13). It is certainly true that this Honorable Court is not bound to follow

the *Travelers* decision. But it is also true that decisions from other states (especially when they are applying nearly identical law) can provide a helpful analysis. See *Whitaker v. Wedbush Secs., Inc.*, 2020 IL 124792, ¶20.

Second, Prate argues that the *Travelers* decision is "easily distinguished" because that case "did not involve an employment status dispute." (Prate's Brief, page 13). Once again, it bears note that this case is not "an employment status dispute" as the term is defined by *CAT Express*. More to the point, what Prate refers to as an "employment status dispute" (i.e., the factual question of whether a subcontractor did or did not have employees) was also an issue in *Travelers*. There, as here, the Court's determination of whether to apply Basic Manual Rule 2-H was dependent on the question of whether the uninsured subcontractor had employees. In this case, 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. In both cases the respective Departments had the jurisdictional authority to resolve the factual question in order to resolve the Manual Rule dispute.

Prate states that it "is blatantly obvious" that reliance on *Travelers* is misplaced, because it was "absolutely necessary" for the Department to resolve the factual issue of whether Prate's uninsured subcontractor "had employees who worked on Prate projects." (Prate's Brief, page 15). The obvious problem with this argument is that it was true in the *Travelers* case as well – where the Court found "There is no evidence that either of the mechanics have [sic] any employees." *Id*., at 383. Stated differently, if (as Prate argues) the *Travelers* case "did not involve an employment status dispute," then neither does this case. In *Travelers*, the Court specifically 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*., at 383. The same is true in this case.

Per Basic Manual Rule 2-H, "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 Prate premiums. Prate disputed the premium charge. The Appeals Board, followed by the Department, had jurisdiction to resolve Prate's premium dispute under Section 462. Given the existence of jurisdiction, the Department was empowered under Section 401 to address those matters arising under the Section 462 jurisdiction – including the factual defense raised by Prate (in opposition to Basic Manual Rule 2-H) concerning whether its uninsured subcontractor did or did not have employees. This view of jurisdiction comports with *CAT Express*, as 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.

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

As to the substantive merits of the matter, and given the high standard of review, the Department's decision in this case was correct and its decision should be affirmed.

The Department correctly applied NCCI Basic Manual Rule 2-H when it stated that "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). As stated by the rules of the Illinois Assigned Risk Plan (i.e., 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).

Notwithstanding the clear language of the relevant Manual Rules, Prate claims that if it "hires 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, there is no basis for the hiring person's insurer to charge an additional premium because there is no exposure to the hiring party or its insurer." (Prate's Brief, page 16). It is important to note that there is simply no authority for this proposition. [4]

Despite its claims to the contrary, Prate is asking this Honorable Court to recognize a "middleman" exception to the Manual Rules. That request does not make sense. Under the relevant policies, Liberty Mutual only has the contractual authority to audit Prate's records. (C 280, at "Records" and "Audit"). Liberty Mutual could not audit Prate's hypothetical "middleman who turns around and sub-subcontracts all labor to another subcontractor."

NCCI Basic Manual Rule 2-H provides a clear set of rules on this issue. When an insured like Prate (engaged in the roofing and construction business) hires a subcontractor to do work it must produce "satisfactory evidence that the subcontractor has workers

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If ARW Roofing had no employees, why would Prate hire it to do roofing work, and continue to pay it, throughout the policy period? Why did Prate's answers to relevant Interrogatories state "Unknown"? (Liberty Mutual's Brief, pages 8-9). The Department's Hearing Officer – after reviewing the evidence – was correct in rejecting Prate's arguments.

compensation insurance in force covering the work performed for the contractor." (C 385). When an insured like Prate cannot produce "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). The rules do not provide any means to deal with a "middleman who turns around and sub-subcontracts all labor to another subcontractor." Indeed, such a system would be nearly impossible to imagine and even harder to enforce. Prate's approach to this problem would be an attack on the protections afforded by the Illinois Workers Compensation Act.

Prate claims it "presented abundant evidence" that ARW Roofing "acted merely as a middleman who turned around and sub-subcontracted all labor on Prate jobs to Reliable Trade Services, who was properly insured." (Prate's Brief, page 17). Prate goes on to claim it "further provided uncontradicted proof to the DOI that ARW Roofing, LLC had no employees of its own." However, and in *contra* to Prate's contentions, the Department both heard and rejected Prate's evidence (which clearly was not "uncontradicted").

After reviewing all the evidence, the Department 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 a "telling admission" by Prate's president when she stated that ARW Roofing and RTS would complete contracts for one another. (C 21). 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).

The notion that Liberty Mutual "failed to introduce any evidence to contradict" Prate's arguments is demonstrably false. Simply put, the Department understood Prate's arguments – but rejected them based upon a review of the "contradictory evidence" in the record (e.g., Prate's prior admissions, Prate's obviously evasive discovery responses, and the affidavit from Liberty Mutual's auditor). The Department's determination on this factual question 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).

Prate's next argument, which cites to Liberty Mutual's television advertisements, claims that its is simply not fair for premiums to be charged in this case. (Prate's Brief, page 21). This is not a valid legal argument. Prate is certainly allowed to believe that there is no "increased risk" due to the use of a "middleman" who "sub-subcontracted all labor," but that belief does not make it so. Both the Illinois Workers Compensation Act and the relevant NCCI Basic Manual Rules require subcontractors engaged in extra hazardous activities to maintain workers' compensation coverage. Prate's wishes notwithstanding, there is no "middleman" exception, the Workers' Compensation Commission would have found coverage for any injured subcontractor – and all insureds must pay the same under the Rules.

Finally, Prate claims that Liberty Mutual miscalculated the premiums in this case. Specifically, Prate objects to the fact that Liberty Mutual calculated the premium "by using 90% of the full contract prices paid to ARW LLC rather than the actual labor cost." (Prate's Brief, page 22). On this point, Prate does not even bother to cite – let alone discuss – the applicable Basic Manual Rule on premium calculation. Certainly Prate does not point to a different rule which would support its own means of calculating premiums.

The Manual Rules explicitly provide for how premiums must be calculated. The relevant portion of the rule is Rule 2-H.2, at Tables 1 and 2. Pursuant to Subcontractor Table 1, "If the contractor has not furnished evidence of workers compensation insurance and...Does not furnish complete payroll records, but documentation of a specific job discloses that a definite amount of the subcontract price represents payroll...Then to calculate the additional premium...Use the payroll amount indicated by the documentation as the payroll, subject to the minimums in Subcontractor Table 2 below. (C 385). Subcontractor Table 2 then goes on to provide that where, as here, the payments are for "labor only," then "the minimum to calculate additional premium is...Not less than 90% of the subcontract price." (C 385-386). That is precisely what the auditor did. (See C 208-209, at ¶¶ 24-36).

Rather than deal with what the Rules actually say, Prate claims that it submitted testimony and documents which it claims were "ignored" by the Department. (Prate's Brief, page 23). That is simply not correct. As stated by the Department:

> 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).

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,

LIBERTY MUTUAL INSURANCE CORPORATION

By: s/ James T. Barnes
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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 20 pages.

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, John C. Schmadeke, an attorney, hereby certify that on March 2, 2022, I electronically filed the foregoing REPLY BRIEF 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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