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Docket No. 46840-2019

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRAVELERS INSURANCE CO.,

Petitioner/Appellant,

-vs-

ULTIMATE LOGISTICS, LLC,

Respondent/Respondent on Appeal.

TRAVELERS INSURANCE CO.'S OPENING APPELLATE BRIEF

Appeal from the District Court of the Fourth Judicial District Court
for Ada County, State of Idaho

The Honorable Michael Reardon, District Judge Presiding

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COMES NOW Travelers Insurance Co. ("Travelers"), the Petitioner/Appellant, by and through its attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., and submits this opening brief asking the Court to set aside the final order of the Department of Insurance of the State of Idaho issued June 30, 2017. Travelers submits that the Final Order exceeds the jurisdiction of the Department and is not supported by substantial evidence on the record, and the district court decision affirming that Order was in error.

I. STATEMENT OF THE CASE

This is an appeal from the district court's decision affirming the Idaho Department of Insurance's Final Order affirming the decision of the hearing officer partially overturning a decision of the Idaho Worker's Compensation Appeals Board. Travelers asserts that the Hearing Officer and the Department of Insurance went beyond the statutory jurisdiction of the Department by deciding whether two mechanics for the employer needed to be covered by workers compensation insurance and whether they were independent contractors or employees. Travelers also asserts that their decision was factually unsupported. Travelers asks the Court to set aside the district court's order affirming the Department's decision and reinstate the decision of the Idaho Worker's Compensation Appeals Board.

II. COURSE OF PROCEEDINGS

Ultimate Logistics, LLC, the employer involved in this matter, was unable to procure workers compensation insurance on the voluntary market, and therefore had to procure an "assigned risk policy." The National Council on Compensation Insurance (NCCI) is the plan administrator for that policy and Travelers was the servicing carrier of the policy. (Transcript of January 11, 2017 hearing before Hearing Officer at 89 (Tr. H.O. in Clerk's Record). Travelers and Ultimate Logistics entered into a contract (the "Policy"). The Policy allowed Travelers to

collect premium for any worker who created risk to Travelers, whether they were an "employee" or anyone else who created risk. (Agency Record "AR" 196).

As part of the insurance process, Travelers conducted an audit of the employer's workforce and payroll to determine the classification of the employer and therefore the premium to be assessed. (Tr. H.O. 66-67). Travelers classified Ultimate Logistics as a trucking company and assessed premium for its workers. Ultimate Logistics objected to the audit determination by Travelers and requested that NCCI, the plan administrator and the rating organization licensed by the State of Idaho, conduct a hearing regarding the proper classification code for the employer. NCCI agreed with Travelers' classification and Ultimate Logistics appealed to the Idaho Worker's Compensation Appeals Board ("Board"), which is authorized by the Idaho Insurance Code to hear premium-based disputes. On August 22, 2016 the Board issued its decision upholding Travelers' classification of the employer as a trucking company. (AR 2). (This is referred to as the "classification issue.") It should be noted that the NCCI and the Board did not deal with the issue whether premium should be assessed for mechanics under the Worker's Compensation policy, as that issue was not within the scope of authority of NCCI or the Board. (That topic is referred to as the "coverage issue.")

Ultimate Logistics then appealed to the Director of the Department of Insurance, who appointed a Hearing Officer by written notice. (AR 7 and 10). The Hearing Officer conducted a hearing on January 11, 2017. Ultimate Logistics attempted to have the Hearing Officer determine whether premium for the mechanics could be assessed and whether the mechanics were employees or independent contractors, but Travelers objected as those issues had not been considered by the Board, were not within the jurisdiction of the Board, were not properly before the Hearing Officer, and were not within the jurisdiction of the Department of Insurance. (Tr. H. O. 10 and 26).

Moreover, Travelers had had no opportunity to conduct discovery on the issue whether the mechanics could be considered employees or independent contractors and whether they presented risk to Travelers as those issues had not been considered by NCCI or the Board below. In addition, Travelers' Policy allowed it to collect premiums for any person who created risk to Travelers, not just "employees." The Hearing Officer ignored Travelers' objections and ordered post-hearing briefing on the issue whether, if the Department of Labor (which has absolutely no role in the workers compensation arena) allegedly said the mechanics did not need to have workers compensation coverage, Travelers could still collect premium. (Tr. H.O. 110). In its post-hearing brief filed January 31, 2017, Travelers again objected to the Hearing Officer considering the coverage issue as neither the Hearing Officer nor the Department of Insurance had jurisdiction to do so, and also argued that the mechanics were employees and in any event presented a risk to Travelers and could be included in coverage under the terms of the Policy although that was an issue for the civil courts to determine. (AR 33).

At the hearing, Steve Landino, a representative of Travelers had explained that whether or not Travelers accepted that the mechanics were "subcontractors," they still were to be considered in workers compensation coverage under the NCCI rules and under the Travelers Policy as they presented risk to Travelers. (Tr. H.O. at 93-96). He had earlier explained to the NCCI that Travelers believed the mechanics were employees. (AR 122). He testified that the mechanics were uninsured and Travelers might have to pay or defend a claim. (*Id.* at 94-95). The Ultimate Logistics representative testified that he had been told by the mechanics and someone at the Department of Labor and the Department of Insurance that the mechanics did not need workers compensation coverage because they were formed as LLC's. (*Id.* at 31and 35). Under the NCCI manual subcontractors are included. (*Id.* at 74).

In her Findings of Fact, Conclusions of Law and Preliminary Order dated March 28, 2017, the Hearing Officer correctly upheld the classification decision of the NCCI and the Board that Ultimate Logistics was a trucking company, but then went beyond the scope of her authority to determine the coverage issue and found that certain mechanics were not employees but rather independent contractors who did not need workers compensation coverage, and ignored the Policy language requiring premium charges for all workers who could present potential risk. (AR 51).

Travelers appealed that decision to the Director of the Department of Insurance, arguing again that the Hearing Officer and the Department had no jurisdiction to consider the coverage issue and that in any event the Hearing Officer's factual determination was incorrect. (AR 67). The Director of the Department of Insurance filed a "Final Order Denying Appeal" on June 30, 2017, concluding that the Department did have jurisdiction to determine the coverage issue and affirmed the Hearing Officer's decision and denied Travelers' appeal.[1] (AR 82).

Travelers timely appealed the Director's Final Order Denying Appeal to the district court. (Clerk's Record "R" at 6). Ultimate Logistics' counsel immediately requested leave to withdraw and the court granted him leave. (R 10, 19, 24). The district court denied Travelers' Motion for Default Judgment and instead directed Travelers to submit briefing on the jurisdictional issues. (R 33). After the original hearing was set, a new attorney attempted to appear for Ultimate Logistics. (R 64). Travelers objected but the district court allowed the untimely appearance and considered Ultimate Logistics' briefing. The court conducted a hearing on September 13, 2018 and found Travelers' appeal was moot, affirmed the Department's Order and awarded attorney's fees under I.C. § 12-121. (R 77). At the hearing on the award of fees, the court considered Travelers' argument as a motion for reconsideration of its original Order and denied the motion and

[1] The Hearing Officer's decision that Ultimate Logistics was properly classified as a trucking company was not appealed and that classification issue is not before the Court.

determined the fee award. Its Judgment was issued February 12, 2019. (R 110). Travelers appealed the district court's decisions. (R 112).

III. STATEMENT OF THE FACTS

As authorized by the Insurance Code, NCCI required Travelers to provide workers compensation insurance to Ultimate Logistics, which could not procure such insurance in the voluntary market. (Tr. H.O. 89-90). Travelers did so pursuant to a Policy issued to Ultimate Logistics that stated, among other things, in Part 5C, that Ultimate Logistics would pay premium for all of its employees and all other persons who could present exposure to claims under the Policy. (AR 196).

Worker's compensation rates in Idaho are based on (a) the classification of the employer under certain accepted classification codes in the NCCI "Scopes Manual" and (b) the size of the payroll of that employer. *See* Idaho Code Title 41, Chapter 16; I.C. § 41-1603. Travelers concluded that Ultimate Logistics was operating as a trucking company properly classified under Scopes Manual Classification Code 7219 and that Ultimate Logistics' mechanics presented risk for which premium should be assessed. (Tr. H.O. 91-93). In May of 2016, Ultimate Logistics objected to this classification and asserted that Code 8380, "automobile service or repair center and drivers," would be the appropriate classification. It requested that Travelers revise its audit determination.

Travelers rejected this request for audit revision and informed Ultimate Logistics that it could bring a formal audit dispute before NCCI, the Rating Organization/Plan Administrator. (AR 134-135). Ultimate Logistics then on May 12, 2016 requested that NCCI conduct a hearing regarding the proper classification code and also sought to bring up the issue of inclusion of the mechanics under the Policy. (*Id.* at 129).

Tim Hughes, Underwriting Dispute Consultant for NCCI, received Ultimate Logistics' request for hearing and requested information from both parties regarding the proper classification code. By email of June 6, 2016, Mr. Hughes specifically advised Ultimate Logistics as follows:

> As we discussed by phone, NCCI has no jurisdiction over coverage related issues; whether certain workers were included for coverage under your policy. The carrier determines whether a worker poses a liability to the policy.

(*Id.* at 126). Steve Landino of Travelers provided Travelers' position to NCCI regarding the sole issue of the proper classification of Ultimate Logistics, as the "coverage related issues" regarding certain mechanics were not before NCCI.

On June 9, 2016, Mr. Hughes on behalf of NCCI informed the parties that NCCI agreed with Travelers that Travelers' classification decision was appropriate. He informed Ultimate Logistics that it had the right to appeal the decision to the Idaho Worker's Compensation Appeals Board, which is appointed by the Idaho Insurance Department and is authorized to hear premium-based disputes. (*Id.* at 123).

Ultimate Logistics on June 16, 2016 requested a hearing before the Idaho Worker's Compensation Appeals Board (the "Board"). (*Id.* at 122-23). Travelers responded that Ultimate Logistics' listing of issues was incorrect and went beyond the initial dispute. It specifically pointed out that the question whether premium for the mechanics could be assessed "poses a legal question, which we will be prepared to address in civil litigation." (*Id.* at 122). NCCI then informed both parties that the worker's compensation classification dispute was scheduled for a hearing before the Board on August 16, 2016. It set out the sole "issue in dispute":

> Travelers assigned workers involved in the service, maintenance and repair of vehicles to Code 7219. Code 7219 applies to trucking operations and includes "garage" operations. [Ultimate Logistics] states they are not a trucking operation because the drivers are not employees of Ultimate

> Logistics. Therefore, workers involved in the service, maintenance and repair of trucks should be classified to Code 8380.

(*Id.* at 118). The NCCI letter also states:

> *NCCI note – NCCI advised UL [Ultimate Logistics] prior to the meeting that the issue of Travelers including certain workers under UL's policy is a coverage issue and is not within the authority of NCCI or the Board to act on. The only issue before the Board is the proper classification of workers covered under the policies.

(*Id.* at 119) (emphasis added).

On August 22, 2016, the Board announced its decision concerning the worker's compensation classification dispute. (*Id.* at 165). Once again, the parties were advised "that the issue of Travelers including mechanics under UL's policy is a coverage issue and is not within the authority of NCCI or the Board to act on. The only issue before the Board is the proper classification of workers covered under the policies." (*Id.* at 166). The Board then reviewed the facts and arguments of the parties and determined that Ultimate Logistics had been "correctly classified to Code 7219 as its business is best described as a trucking company." (*Id.* at 167).

By letter of September 21, 2016 to the Director of the Idaho Department of Insurance, Ultimate Logistics requested a hearing to appeal the Board's decision. (Agency Record ("Rec"), p. 1). On September 20, 2016, the Director issued a Notice of Appointment of Hearing Officer. (Rec. p. 7). Her appointment authority was to decide the appeal from the decision of the Idaho Worker's Compensation Appeals Board: "The Director of the Idaho Department of Insurance ("Director"), having received an appeal by ULITMATE LOGISTICS, LLC, from the decision of the Idaho Workers Compensation Appeals Board . . . pursuant to Idaho Code § 41-1623 . . . ."

The Hearing Officer conducted a hearing on January 11, 2017. (See Tr. H.O.). Ultimate Logistics attempted to present hearsay evidence regarding whether the mechanics were independent contractors and whether the Department of Labor had advised that LLC's were not

required to have coverage. Counsel for Travelers objected, noting that the coverage issue was not properly before the Hearing Officer, had not been decided by the Board, and was not within the jurisdiction of the Department of Insurance. (Tr. H.O. 28 and 30). Travelers noted that NCCI and the Board had not considered that issue and in fact had specifically held that they had no jurisdiction over the coverage issue and would not be determining that issue. Travelers further noted that it had had no independent opportunity to conduct discovery regarding the facts surrounding the work of the mechanics, because whether a worker presents risk is entirely fact-specific. The Hearing Officer ignored these objections and allowed hearsay testimony regarding the issue whether mechanics should be included for coverage under the policies. The Hearing Officer also ordered post-hearing briefing on that issue. (Tr. H.O. 10-11).

In Travelers' Post-Hearing Brief filed January 31, 2017, Travelers objected to the Hearing Officer considering the issue of whether the mechanics presented risk or were independent contractors as those issues were beyond the jurisdiction of the Department of Insurance and the Hearing Officer. (AR 33). Travelers reiterated that the only question that was determined by the Board, and thus the only question that the Notice of Appointment of the Hearing Officer allowed the Hearing Officer to consider, was whether Ultimate Logistics was properly considered a trucking company under NCCI classification 7219.

In her Findings of Fact, Conclusions of Law and Preliminary Order, the Hearing Officer correctly upheld the classification decision of the Board that Ultimate Logistics was a trucking company and therefore NCCI Classification Code 7219 was properly assigned to it. (AR 51). But she then went beyond the decision of the Board and beyond the jurisdiction of the Department of Insurance to determine that Ultimate Logistics' mechanics were not employees but rather independent contractors and their LLC's were not required to have workers compensation

coverage, and Travelers did not have the contractual right to charge premiums for the mechanics. Travelers appealed that aspect of her decision in April 2017. (AR 67). Travelers argued that the decision exceeded the Hearing Officer's authority under her appointment as a hearing officer, exceeded the jurisdiction of the Department of Insurance, and violated Idaho Code (and was factually unsupported). Ultimate Logistics failed to respond timely and the Director closed the record. (AR 77).

The Director issued his Final Order on June 30, 2017. (AR 82). He agreed with the Hearing Officer that Ultimate Logistics was properly classified by the Board under Code 7219 as a "trucking operation."[2] He also concluded, however, that the Department had jurisdiction to determine the coverage issue regarding the mechanics, even though both NCCI and the Board had refused to consider that issue as it was not within their jurisdiction. He therefore adopted the Hearing Officer's conclusions regarding the coverage issue despite the fact that the Department had no statutory authority to make that coverage determination and despite the fact Travelers had no real opportunity to conduct discovery on that issue as it was not considered by NCCI or the Board. Travelers timely appealed to the district court on July 25, 2017.

IV. ISSUES PRESENTED ON APPEAL

1. Does the Idaho Department of Insurance have jurisdiction under Idaho statute to determine the coverage issue?

2. Does the Idaho Department of Insurance have jurisdiction to determine whether individual workers are employees or independent contractors for worker's compensation coverage purposes and whether a workers compensation policy can include them within the risk pool?

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[2] Again, that aspect of the Final Order was not appealed and became final.

3. Does the Ultimate Logistics' Policy allow Travelers to collect premiums for the mechanics?

4. Whether the Department of Insurance's Final Order incorporating the Hearing Officer's decision is supported by substantial evidence on the record.

5. Whether the two mechanics at issue are employees or independent contractors.

6. Whether the matter should be remanded to the Idaho Department of Insurance to allow additional discovery and fact-finding regarding the coverage and contract issues.

7. Whether substantial rights of Travelers were prejudiced by the Department's Order.

8. Did the district court improperly exercise its discretion in allowing Ultimate Logistics' counsel to appear and in considering Ultimate Logistics' briefing and in denying Travelers' motion for entry of default judgment?

9. Did the district court err in awarding attorneys fees to Ultimate Logistics?

V. LEGAL ARGUMENT

In an appeal from a decision of the district court acting in its appellate capacity under the Idaho Administrative Procedure Act, this Court reviews the agency record independently of the district court's decision. *Howard v. Canyon County Bd. Of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996); *Lone Ranch P'ship v. City of Sun Valley*, 144 Idaho 584, 166 P.3d 374 (2007). Construction of a statute is an issue of law and an appellate court exercises free review of the district court's decision. *Friends of Farm to Mkt. v. Valley Co.*, 137 Idaho 192, 196, 46 P.3d 9, 13 (2002).

The Idaho Administrative Procedure Act authorizes this Court to review the decision of the Department of Insurance, although the Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67–5279(1). The Court

may set aside the agency's decision, however, if the Court finds that the agency acted in violation of statutory provisions and in excess of its statutory authority, or if the decision was not supported by substantial evidence on the record as a whole or was arbitrary, capricious or an abuse of discretion. *Id.* The Court may set aside in whole or in part and/or remand if the agency's action is not affirmed as long as substantial rights of the appellant have been prejudiced. *Id.*

A. The Department Acted in Excess of Its Statutory Authority and In Violation of Idaho Code.

The Department of Insurance (and its director and any hearing officer) derives its authority from the Idaho Insurance Code, Title 41 of Idaho Code. Idaho Code § 41–201 creates the Department of Insurance, and Idaho Code § 41–210 provides that the Director shall have only the power and authority expressly conferred upon him or reasonably implied from the provisions of the Insurance Code. There is nothing in Title 41 that authorizes the Department or a hearing officer to determine the coverage issue, to determine a Policy dispute, or to determine whether a specific individual is an independent contractor or an employee. There is nothing in either Chapter 16 or Chapter 2 of Title 41 or IDAPA § 18 that would give the Department any guidance as to how the status of independent contractor versus employee is to be determined or how a contract provision should be interpreted.

The appointment of the Hearing Officer in this case by the Department of Insurance specifically references Idaho Code § 41–1623 as authority for the Department to hear an appeal from the "filings" referenced in Title 41, Chapter 16 regarding "workers compensation rates." (AR 7). Specifically, Idaho Code § 41-1602 authorizes rating organizations such as NCCI to make rates and § 41-1615 requires every insurer to be a member of a rating organization. Every member (insurer) must adhere to the rating organization's manuals of classifications. Idaho Code § 41-1620(3). Section 41-1603 provides for "classifications" for the establishment of rates and

premiums and Section 41–1606 provides that insurers or their rating organizations must file with the Director their classification manuals and rating plans. Section 41-1622 requires each rating organization (e.g., NCCI) to provide a hearing to any employer to "review the manner in which such rating system has been applied . . . ." Section 41–1623 allows an employer to challenge whether a "filing" fails to meet the requirements of law. Thus, the Department only had the authority to consider whether the filing by NCCI regarding Classification Code 7219 is proper.

More specifically, Chapter 16 of the Insurance Code deals with workers compensation insurance rates. It authorizes insurers to make premium rates for worker's compensation insurance coverage through membership in required rating organizations and provides for review by the Department of ratemaking and the results thereof. Idaho Code §§ 41–1602, 1606 and 1615. Basically, worker's compensation insurers acting in concert and pursuant to control by certain rate-making organizations such as NCCI determine rates and file those rates with the Department, and the Department can review those filings. Under Idaho Code § 41–1623, an aggrieved person may appeal from such filing. The Director's "Appointment of Hearing Officer" Notice dated September 9, 2016 specifically noted that the Department had received an appeal by Ultimate Logistics from the decision of the Idaho Worker's Compensation Appeals Board pursuant to Idaho Code § 41–1623 and accordingly appointed a hearing officer to conduct the appropriate hearing regarding the rate filing.

This appointment document in itself is enough to have the Hearing Officer's/Department's decisions overturned, as those decisions dealt not with rate filings and classifications as required under Chapter 16 of Title 41 and specifically Idaho Code § 41– 1623, but dealt with worker's compensation premium charges for particular individuals and the interpretation of a contract between Travelers and Ultimate Logistics. That is, even if there were any provision in the

Insurance Code in general that would have allowed the Hearing Officer to determine whether a particular mechanic should be included in the Policy risk or is an independent contractor, the scope of the Hearing Officer's authority was constrained by the appointment document which only deals with Idaho Code § 41-1623 relating to the classification of Ultimate Logistics as a trucking company.

The Hearing Officer and the Department under Idaho Code § 41–1623 could certainly consider and determine an appeal from an insured employer regarding the application of the rating system to its policy. This would allow the Department to consider whether NCCI Classification Code 7219 is applicable to the Ultimate Logistics operation, and therefore affirm or reverse the decision of NCCI and the Board. This is what the Hearing Officer did in the first portion of her decision. The Department affirmed the Board's conclusion that Ultimate Logistics was properly classified as a trucking operation. That is the extent of the Department's authority under Idaho law and the extent of the Hearing Officer's scope of authority under the delegation by the Director through his "Appointment of Hearing Officer."

Chapter 16 of Title 41 permits the Department only to consider the propriety of classification codes and their application to particular businesses by the rating organization. The rating organization (NCCI) and the Board do not have the power or jurisdiction or ability to decide whether premium charges are appropriate for specific individual workers. Thus, the appeal from the Board's decision to the Department is limited to what the Board considered: whether Ultimate Logistics is a trucking company.

This is clearly borne out by the statement by the Board: "The issue of Travelers including the mechanics under UL's policy is a coverage issue and is not within the authority of NCCI or the

Board to act on. The only issue before the Board is proper classification of workers covered under the policies." (AR 164).

Chapter 16 of Title 41 deals with classification, not coverage. It authorizes the Worker's Compensation Appeals Board and the Department of Insurance to review classification decisions. It does not deal with coverage issues. A coverage issue can only be determined through the civil litigation process for contract interpretation or by the Idaho Industrial Commission under Title 72 of Idaho Code for determination whether a worker is an employee. The Department does not have jurisdiction to decide whether an insurance policy allows the insurer to collect premium on certain individuals who present risk, as is provided for in the Travelers policy. Contract interpretation is the province of the civil courts after adequate discovery is completed regarding risk presented by the mechanics.

In addition, the issue whether a worker is an independent contractor or an employee is outside of the statutory authority of the Department of Insurance and outside of its expertise and process. That determination is a fact-specific inquiry to be conducted by the Idaho Industrial Commission, which has exclusive authority over worker's compensation matters including categorization of workers. The Department of Insurance has no expertise in interpreting Title 72 of the Idaho Code dealing with definitions of “employee” versus “independent contractor.” Moreover, the Department did not have before it the facts necessary to determine whether the mechanics were independent contractors as there is no discovery process in an appeal to the Department of Insurance from a classification decision by the Idaho Worker's Compensation Appeals Board. How can the Hearing Officer fairly adjudicate fact-specific issues when there was no discovery into the elements that determine the question of employee versus independent contractor, and no discussion of the requirements of the Policy?

The district court concluded the Travelers' appeal was "moot" because the Travelers' witness, Mr. Landino, had conceded at the hearing that the mechanics were subcontractors. Landino conceded that the mechanics through their LLCs may have purchased worker's compensation policies, but noted they did not elect coverage for the mechanics themselves. Therefore, those mechanics still presented a risk to Travelers under both the NCCI rule and the insurance policy.

Mr. Landino explained that because the mechanics did not have adequate personal coverage for worker's compensation claims, under Rule 2-H.2 of the NCCI Rules adopted and applicable to Idaho, premium charges should be made for those mechanics. (Tr. H.O. at 93-97, 107-08). The NCCI representative, Mr. Craddock, also explained that the Rule in the Scopes Manual applied to subcontractors of trucking companies. (Tr. H.O. at 74-75). The Scopes Manual is the governing NCCI Manual dealing with classification of employees. Section 7219 of that Manual defines the trucking classification which the Department accepted. That section also provides:

> Platform persons engaged in loading or unloading merchandise as well as miscellaneous employees such as terminal employees, garage employees and repairers are considered to be an integral part of the trucking operations and are assigned to code 7219.

(AR 95).

Mr. Landino then went on to explain that even without the NCCI Rule, mechanics were required to be charged premium pursuant to part 5C of the Policy. (Tr. H.O., pp. 94-95). He testified:

> "So if there is exposure for someone working for the insured, and we might have to pay a claim, then we are going to pick up that exposure." Question: "So the bottom line is that these mechanics could present a risk or present exposure to Travelers and that is why

> Travelers included them within this policy; is that correct?" Answer: "Correct."

(*Id*. at 95, ll. 2-10).

Assuming that this issue was even within the jurisdiction of the Department of Insurance, the Hearing Officer and the Director did not appear to understand the issue. Assuming that the mechanics were considered to be subcontractors, the Department concluded that they were not required to purchase worker's compensation insurance under Title 72 of the Idaho Code. The Department of Insurance has no jurisdiction to determine which individuals should be covered under the terms of an insurance policy. If the Court were to consider this issue, the Policy language is clear that any person engaged in work (whether as an employee or an independent contractor) that could make Travelers liable for payment of workers compensation benefits will be included for premium calculations, as long as those persons do not provide evidence of other workers compensation coverage that would cover them and their employees. While the mechanics, even if they were actually independent contractors under their own LLCs, might not have been required to purchase worker's compensation insurance under Title 72 of the Idaho Code, they still presented a risk to Travelers and were properly included within the premium pursuant to the insurance contract as they did not elect coverage for themselves under any policy.

In addition, if any of the alleged independent contractor mechanics did pursue a claim before the Industrial Commission, Travelers would be required to defend the claim on behalf of the Employer, Ultimate Logistics. Travelers' duty to defend does not end merely because the Department concluded that Travelers could not assess premiums because the mechanics were single member LLC's or independent contractors.

The Connecticut Court of Appeals dealt with this very issue in *Compassionate Care, Inc. v. Travelers Indemnity Co.*, 147 Conn. App. 380, 83 A.3d 647 (Conn. App. Ct. 2013). It held that

an insurance company may charge a premium based on its risk exposure regardless of whether disputed individuals are classified as employees or independent contractors. The factual background was similar to the present case in that a company obtained an assigned risk policy and objected to the workers compensation insurer's assessment of premium on individuals whom it claimed were independent contractors. While the appellate court found that the individuals were independent contractors, it nevertheless concluded that under the policy terms the insurer could charge the company an increased premium based on the remuneration paid for services of all other persons engaged in work that could make the insurer liable under the policy. The appellate court noted that the alleged independent contractors were part of the insurer's exposure to risks because the insurer had a duty to defend that extended to all claims made against the workers compensation policy, regardless of the worker's classification as an employee or independent contractor. Even if it could later be determined that the workers were ineligible for workers compensation as employees, the insurer still was exposed to risk and therefore was entitled to assess a premium. Because the duty to defend is broader than the duty to indemnify, the obligation of the insurer to defend does not depend upon whether the worker will actually prevail in the claim for workers compensation insurance. Rather the policy requires the insurer to defend irrespective of the ultimate outcome. The Connecticut appellate court noted that if one of the alleged independent contractors filed a claim against the employer for workers compensation benefits,

> the [insurer] would be contractually required to defend any claim at their expense. If, for example, the [insurer] were not entitled to collect a premium from the [employer] based on his risk exposure but, instead, based solely on the [employer's] contentions that the [workers] were independent contractors, the [insurer] would be indemnifying the entirety of the [employer's] risk in exchange for little compensation. This duty to defend would require the [insurer] to represent the [employer] in any dispute filed by any potential claimant regardless of whether the [employer] intended to cover the particular claimant under its Worker's Compensation policy.

Id. at 403, 83 A.3d at 662.

Accordingly, the Connecticut court found that the insurer had the contractual right to charge the employer the increased premium based on its final audit of the employer's business operations, which demonstrated a much higher risk exposure on the insurer's part than originally estimated. This is exactly the situation in the present case, although in the present case the mechanics were clearly employees rather than independent contractors.

But the Department has no jurisdiction to consider whether the mechanics were independent contractors. Indeed, there is not even a definition in the Insurance Code of the terms "employer" or "independent contractor." Instead, those terms are defined in Idaho Code § 72–102, the Worker's Compensation Act. It is Title 72 that creates the Idaho Industrial Commission to administer the worker's compensation statute and decide whether an individual is an employee as defined in Idaho Code § 72–102(12) or an "independent contractor" as defined in Idaho Code § 72 – 102(17). Section 72–501 creates the Industrial Commission to administer the worker's compensation statute and apply the definitions in Title 72. The Legislature created the Industrial Commission to determine worker's compensation "coverage." Idaho Code § 72-707 states: "all questions arising under this law . . . shall be determined by the Commission." Idaho Code Title 72, Chapter 2 deals with "Scope – Coverage – Liability" in worker's compensation matters. Section 72–203 provides that the worker's compensation statute applies to all private employment not expressly exempt. It is beyond dispute that the Legislature expressly delegated to the Idaho Industrial Commission under Title 72 the exclusive authority to determine whether a worker is an "employee" subject to the provisions of the worker's compensation law. Indeed, Idaho Code § 72–204 specifically defines coverage of private employment and states that "the following shall

constitute employees in private employment and their employers subject to the provisions of this law."

This authority is not shared with the Department of Insurance. To determine otherwise would be to subject employers and insurers not just to uncertainty but to huge potential liability, as seen in the following hypothetical: one of the mechanics for Ultimate Logistics is severely injured and totally disabled as a result of an accident while he was working on a truck at the Ultimate Logistics garage. Because the Department of Insurance had concluded in its Final Order that he was an independent contractor, no worker's compensation insurance premium had been collected for him by Travelers and no worker's compensation coverage was in effect for him. Nevertheless, as he has the right to do under the worker's compensation statute, the mechanic files a claim for workers compensation benefits with the Industrial Commission, asserting that he was actually an employee as defined in Title 72. Travelers is obligated under the Policy to defend this claim. The Idaho Industrial Commission, as it is specifically authorized to do, considers whether the mechanic is an employee and decides that indeed he meets the criteria for an "employee" set forth in the worker's compensation statutory definitions. The Commission requires that medical benefits, impairment benefits and total disability benefits are due and owing, as is a penalty for failure to cover the employee under worker's compensation insurance. Will the Department of Insurance step in and defend the insurer/employer and pay the potentially hundreds of thousands of dollars in benefits that the Industrial Commission has determined are due to the mechanic/employee, as well as the defense costs incurred by Travelers?

To ask this question is to answer it: the Department of Insurance's decision has no binding effect on the Idaho Industrial Commission. The Idaho Industrial Commission is the entity authorized by the Idaho legislature to make the decision regarding the employment status of

worker's compensation claimants. Title 72 of the Worker's Compensation Act, not Title 41 of the Idaho Insurance Code, contains the definitions for employee and independent contractor and contains the authority for the Industrial Commission, not the Department of Insurance, to make that determination. The Worker's Compensation Act allows for discovery and a specific hearing on the issue of employee versus independent contractor; the Insurance Code does not, as seen in the present case where no discovery occurred.

Accordingly, it is clear not only that the Department of Insurance went beyond its statutory authority but, in addition, it invaded the province of the courts and/or the Idaho Industrial Commission in violation of the express authority of the Idaho Legislature. The Insurance Department is limited to determination of the proper rates and classifications; the courts are given the right to interpret contracts and the Industrial Commission is given the authority to determine specific coverage of individuals. Indeed, the Idaho Supreme Court has noted "the uniquely broad grant of original and exclusive jurisdiction over workers' compensation matters given to the Industrial Commission …." *Brannon v. Pike,* 112 Idaho 938, 940, 737 P.2d 459, 461 (1987); *see* also *Van Tine v. Idaho State Insurance Fund,* 126 Idaho 688, 689, 889 P.2d 717, 718 (1994) (noting that the Commission has exclusive jurisdiction over "all questions arising under" the workers' compensation law) (citing I.C. § 72-707).

B. The Department of Insurance's Decision That Mechanics Did Not Need to Be Covered by the Policy and Were Independent Contractors Was Not Supported By Substantial, Competent Evidence On The Record and Is Incorrect.

Travelers does not concede that the Department of Insurance has the authority to decide whether the Ultimate Logistics mechanics were employees versus independent contractors or were included under the Travelers Policy. Moreover, it asserts that the Hearing Officer's delegated authority was limited by her appointment document to a review of the Worker's Compensation

Appeals Board decision regarding the classification of Ultimate Logistics as a trucking company. Travelers contends it was unfairly prejudiced and surprised by the expansion by the Hearing Officer/Department of the issues under review, as Travelers had no ability to conduct discovery regarding the risk presented by the mechanics.

But even if the Department had the authority to consider the issue of employee status, its decision is not supported by the limited evidence in the record. The only basis for the hearing officer's conclusion that the mechanics had procured their own workers compensation insurance was the hearsay testimony by Ultimate Logistics' general manager who stated that one of the mechanics had spoken with the Department of Labor and the Department of Insurance, and was informed that his LLC was not required to have workers compensation insurance. (Tr. HO at 31). He then went on to state that he called the Department of Labor to confirm. (*Id.*) There is thus no valid evidence of the mechanics' purchase of workers compensation insurance and Travelers was prejudiced by the admission of such hearsay evidence.

The issue of coverage was not noticed by the Department in its notice of hearing as the issue had not been dealt with by the NCCI or the Worker's Compensation Appeals Board below. Its legal conclusion is unsupported by any admissible evidence. Even accepting the evidence which is not substantiated, it is important to note that neither the Department of Labor nor the Department of Insurance has any statutory role in administering Title 72 of the Idaho Code which deals with workers compensation coverage.

Moreover, whether the mechanics were not required under the Worker's Compensation Statute to carry workers compensation insurance for their single-member LLC does not answer the question whether the NCCI Scopes Manual and/or the Travelers insurance Policy allows or requires mechanics to be covered. Mechanics working at Ultimate Logistics present a risk to

Travelers and therefore must as a matter of NCCI policy and contract law be included within the risk pool and have premium assessed for them. It is clear that the mechanics did present risk under the Travelers' Policy and the mechanics should be considered employees of Ultimate Logistics under the definitions of those terms in Title 72, the guidance and decisions of the Idaho Industrial Commission on that issue, and Idaho Supreme Court decisions.

The Idaho Worker's Compensation Act contains certain definitions. Idaho Code §72–102(12) defines "employee" as "synonymous with 'workman' and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer." Section 72–102(17) defines independent contractor as a person "who renders service for a specified recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

In Idaho, the basic criterion for determining independent contractor status versus employee status is the right to control test. The Idaho Supreme Court "generally looks at four factors when analyzing whether a right to control exists, including: (1) direct evidence of such right; (2) the method of payment for the work completed; (3) the party responsible for furnishing the major items of equipment; and (4) the right to terminate the employment relationship at will and without liability." *Hernandez v. Triple ELL Transport, Inc.*, 145 Idaho 37, 40, 175 P.3d 199, 202 (2007). Furthermore, "when a doubt exists as to whether an individual is an employee or an independent contractor under the Worker's Compensation laws, the act must be given a liberal construction by the [Idaho Industrial] Commission in its fact finding function in favor of finding the relationship of employer and employee." *Livingston v. Ireland Bank*, 128 Idaho 66, 69, 910 P.2d 738, 741 (1995).

The Idaho Industrial Commission has commissioned an official publication entitled “Independent Contractor or Employee?" (AR 40). This brochure sets out a concise explanation of the elements of the right to control test utilized in Idaho. It notes that the legal determination requires a factual judgment on each element of the test (and Travelers reasserts that the Hearing Officer and Director had no jurisdiction to make this factual judgment). The document also reiterates that the Idaho Supreme Court has “repeatedly recognized that those cases where there is doubt about whether a worker is an independent contractor or employee are to be resolved in favor of finding the worker to be an employee."

Under the “Direct Evidence of the Right to Control” factor, it is stated that “integration of the worker's services into the principal’s business operations shows that the worker is subject to direction and control." This element is clear in the present case as the mechanics' services are integral to the Ultimate Logistics trucking operation. Moreover, those mechanics' services are rendered personally and there is proof that each mechanic works full time or almost full-time on Ultimate Logistics' equipment. Those mechanics do not make service available to the general public as they perform the services in the garage at the Ultimate Logistics premises.

The Industrial Commission goes on to point out the factor of “Method of Payment,” and the evidence before the Hearing Officer indicated that the mechanics are paid regularly by Ultimate Logistics based on the number of hours specified on their invoices. The third factor relates to “Furnishing of Major Items of Equipment” and the first element provides that “if the work is done on the premises of the person for whom the services are performed, this shows control over the worker." This is clearly the case of the mechanics who do their work in the Ultimate Logistics garage. Finally, the “Right to Terminate Relationship Without Liability” factor strongly supports the conclusion that the mechanics are employees. There is a continuing relationship, as Ultimate

Logistics conceded, with the mechanics. The Ultimate Logistic witness also noted that he discharged a previous mechanic and claims the right to do so at any time.

The brochure also lists “Quick Facts." The Industrial Commission states:

> Improperly classifying employees as subcontractors as a device to avoid paying workers' compensation premiums is on the rise in Idaho. This is illegal and can result in unexpectedly large premium payments due at audit, policy cancellation, civil or criminal charges, fines, and jail time.

(Quick Facts 6)

As the Commission states in its introduction, “though it may be tempting to save money by classifying workers as independent contractors, misclassification can have serious financial and legal consequences." The “Quick Facts” section also notes that “reporting wages on a 1099 form is not, by itself, an indication of independent contractor status. Other factors can be involved that will result in a conclusion of an employer/employee relationship, even if the wages are reported on a 1099."

Despite the fact that Ultimate Logistics may have set the mechanics up with their own individual LLCs and may pay them their hourly wages by means of a 1099 and may wish to title them as “independent contractors” in order to save on worker's compensation premium, the reality is that if any of the uninsured mechanics is injured under a trailer owned by Ultimate Logistics while working at Ultimate Logistics’ location and being paid a set hourly wage by Ultimate Logistics, that so-called “independent contractor” mechanic or his estate may well file a worker’s compensation claim against Ultimate Logistics. Travelers would be obligated to defend. If the mechanic or his estate were to prevail in convincing the Idaho Industrial Commission that he met all the indicia of an employee no matter what Ultimate Logistics wished to title him, Travelers as

the surety for Ultimate Logistics would be responsible for payment of worker's compensation benefits.

That is why Travelers, as would every insurance company, must consider the risk posed by workers employed by a company for which it is the surety. This is what Travelers did in this case and properly classified the risk by defining Ultimate Logistics as a trucking company, and, consequently, required the mechanics to be listed as workers for whom premium is collected pursuant to the payroll for those individual workers, whether paid by 1099 or by W-2, as is permitted under the Policy.

The Hearing Officer/Department appeared to be confused by the fact that the Workers Compensation Act exempts members of limited liability companies from having to carry workers compensation insurance on themselves. I.C. § 72-212. While this may be correct, it does not obviate the fact that the Department of Insurance does not have jurisdiction to interpret Title 72 and more importantly, does not obviate the risk that the mechanics pose to Travelers under its Policy. If the mechanics were injured and found to be employees of Ultimate Logistics, Travelers would have to pay medical and indemnity benefits as well as defense costs. That is why premium should be assessed pursuant to the terms of the Policy.

C. <u>If the Court Believes the Department Insurance Does Have Jurisdiction to Determine the Coverage Issue, It Should Remand for Further Proceedings</u>.

If the Court determines that the Department of Insurance has statutory authority to determine the contractual issues and to determine whether the mechanics are independent contractors or employees, Travelers would request the Court remand the matter to the Department of Insurance and require it to allow Travelers to conduct proper discovery and proceed with a hearing on the coverage matter. Travelers did not have the opportunity to develop a full record because the issue of the Policy terms and the issue of independent contractor/employee were not

considered by the NCCI or the Board and were not part of the charge to the Hearing Officer for determination. Travelers requests an opportunity to gather evidence and obtain testimony from the mechanics to determine whether the right to control existed on the part of Ultimate Logistics, and therefore whether the mechanics were actually employees and to present evidence regarding the risk posed by the mechanics under the Policy.

D. Substantial Rights of Travelers Were Prejudiced.

The Department's Final Order negatively affected Traveler's right to charge the proper premium to Ultimate Logistics for the mechanics. It precluded Travelers from including the mechanics as covered workers for premium purposes. As discussed above, this may result in inconsistent results if the Industrial Commission ever considered a claim under the Worker's Compensation Code brought by the mechanics. *See Mena v. Idaho State Board of Medicine,* 160 Idaho 56, 66, 368 P.3d 999, 1009 (2016). Thus, substantial rights of Travelers were prejudiced by the Department's decision, because Travelers may be required to defend and indemnify Ultimate Logistics if any mechanic brought a workers compensation claim.

E. The District Court Erred in Allowing Ultimate Logistics to Appear and in Awarding Fees to Ultimate Logistics.

Ultimate Logistics did not respond timely or through an attorney at the appeal before the Director of the Department. At the district court level, Ultimate Logistics' previous attorney appeared only to move to be allowed to withdraw because he had not been paid by his client. The district court granted that motion and stated that it would decide the issue based solely upon Travelers' papers. (AR 34). Months after the court allowed counsel to withdraw, and shortly before the time set for the original hearing on Travelers' appeal, the court permitted new counsel to appear and file a brief and participate in argument. Travelers submits that the decision by the district court was improper and violated not only the civil rules but also the court's own order

stating that it would make a decision based solely on the papers submitted by Travelers. Travelers was prejudiced not only because of new issues and argument submitted by Ultimate Logistics but also because of the additional costs and fees it incurred and by the subsequent decision by the district court awarding attorneys fees and costs to Ultimate Logistics.

Even assuming that the district court could have or should have allowed Ultimate Logistics to participate after its original counsel withdrew and it did not appear within the allotted time under Rule 11, and even assuming that the court properly allowed Ultimate Logistics to participate in the briefing and oral argument, there is no basis for an award of attorney's fees to Ultimate Logistics. The court concluded that Travelers' only issue on appeal was "moot" and the appeal was brought without foundation pursuant to Idaho Code § 12–121. Travelers submits that not only was the district court wrong on the substantive merits but was wrong on its decision on attorney's fees. Travelers pursued a meritorious argument that the Department of Insurance did not have statutory jurisdiction to consider the coverage issue and did not have jurisdiction to determine whether the insurance Policy between Travelers and Ultimate Logistics permitted Travelers to assess premium based on the mechanics' wages nor did it have jurisdiction to infringe on the delegated authority of the Idaho Industrial Commission to determine whether the mechanics were employees or independent contractors. The issues as seen in this appeal are not moot and Travelers did not pursue the appeal without foundation. The claim by the district court that Travelers' appeal is somehow "moot" is negated not only by the Hearing Officer's decision which speaks to her conclusions that the mechanics are not employees and are not required by Idaho law to be covered by worker's compensation laws (AR 51), but also by the Director's Final Order which states that the Department is not only able to but is required to make the "determination that an employer/employee relationship exists before any obligation to insure arises." (AR 89).

The Hearing Officer's Findings of Fact and Conclusions of Law states that the "issue presented by this case is whether Ultimate Logistics is properly classified as a trucking company and, based upon that classification, whether its two mechanics must be covered by workers compensation insurance." (*Id.* at 52). It then goes on to state as a fact that the "two mechanics who work on site are not employees of Ultimate Logistics" apparently because "each mechanic has established their own sole member LLC." It then states that Ultimate Logistics' mechanics allegedly "were all advised by the Idaho State Insurance Fund and the Department of Labor that workers compensation insurance was not required for mechanics because they were sole member LLCs."[3] (*Id.*). The Hearing Officer, after analyzing Title 72 of the Idaho Code, which is the workers compensation statute administered by the Idaho Industrial Commission, then reached Conclusions of Law. She determined that mechanics were "clearly not employees of Ultimate Logistics and are independent contractors." She concluded that the mechanics are not required by Idaho law to be covered by worker's compensation laws. (*Id.* at 60).

The Department of Insurance has no jurisdiction to determine which individuals should be covered under the terms of an insurance policy. If the Court were to consider this issue, the Policy language is clear that any person engaged in work (whether as an employee or an independent contractor) that could make Travelers liable for payment of workers compensation benefits will be included for premium calculations, as long as those persons do not have evidence of other workers compensation coverage that would cover them and their employees. While the mechanics, even if they were actually independent contractors under their own LLCs, might not have been required to purchase worker's compensation insurance under Title 72 of the Idaho Code, they still

[3] It is telling that the Hearing Officer claimed that the mechanics had been advised by the "Idaho State Insurance Fund" that they did not need workers compensation insurance. This is incorrect. The hearsay testimony in the hearing did not mention the Idaho State Insurance Fund but rather the Department of Insurance, (Tr. H.O. at 31), which has no authority to advise whether coverage is required.

presented a risk to Travelers and were properly included within the premium pursuant to the insurance contract as they did not elect coverage for themselves under any policy.

This is why the issue of independent contractor versus employee might become relevant. Travelers determined that mechanics who were performing work for Ultimate Logistics, even if they were "subcontractors," could make Travelers liable for workers compensation benefits. That is, if a mechanic were injured while working on the Ultimate Logistics truck fleet, because he had no worker's compensation insurance coverage for himself, he could well claim that he was actually an employee and entitled to coverage under the Travelers' Policy. That determination would be made by the Idaho Industrial Commission in a workers compensation claim, not by the Department of Insurance. The Department of Insurance decision in this case would have no binding effect on the Industrial Commission. Thus Travelers would be faced with the obligation to defend and could be faced with the obligation to pay hundreds of thousands of dollars in medical and indemnity benefits for the mechanics if the Industrial Commission concluded they were employees, yet under the Department of Insurance decision Travelers is not allowed to charge premium for those mechanics. That is why the Department of Insurance cannot be considered to have jurisdiction over individual coverage decisions or Policy interpretation. That is why the issue is not "moot" as the district court mistakenly decided.

V. CONCLUSION

The Idaho Insurance Code, Idaho Code §41–1620, requires that insurers offering worker's compensation insurance belong to a rating organization such as NCCI. Those rating organizations create classifications for various businesses. If an employer disagrees with the classification into which the insurer places it, that employer may first appeal to the rating organization and then to the Idaho Worker's Compensation Appeals Board, and finally to the Department of Insurance.

Idaho Code §41–1623. Nowhere does the Insurance Code require or permit the Department to determine whether any specific worker should be included in coverage under the insurance policy. That issue of coverage is reserved for the civil courts which can interpret the Policy. Nowhere in the Insurance Code are there definitions of "employees" or "independent contractors." That issue is expressly delegated to the Idaho Industrial Commission pursuant to Title 72, the Worker's Compensation Act.

Travelers respectfully submits that the Hearing Officer exceeded her delegated authority under her Notice of Appointment, and the Department exceeded its statutory jurisdiction, by considering an issue that was not considered by the Worker's Compensation Appeals Board and that is not authorized or even contemplated in Chapter 16 of the Insurance Code. No discovery had occurred. The proper forum for such a coverage inquiry is a district court or the Idaho Industrial Commission, not the Department of Insurance appeals process under Chapter 16 of Title 41.

Travelers Insurance respectfully requests the Court to set aside the portion of the Department of Insurance Final Order regarding the coverage status of the mechanics employed by Ultimate Logistics, while upholding that portion of the Order holding that Ultimate Logistics should be classified as a trucking company under Code 7219, and reinstate the decision of the Idaho Workers Compensation Appeals Board.

Specifically, the Court should set aside the coverage portion of the Department's Order and remand the claim to the Department for proceedings consistent with its decision.

RESPECTFULLY submitted this 23rd day of August, 2019.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following attorney(s) this 23rd day of August, 2019, as indicated below and addressed as follows:

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