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In re Idaho Workers Compensation Board Respondent's Brief Dckt. 46840

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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

ULTIMATE LOGISTICS, LLC'S RESPONSE 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 Ultimate Logistics ("UL"; "Respondent") by and through its attorney, Lawrence E. Kirkendall, of Armstrong & Kirkendall, Chtd., and does hereby submit the following Response Brief.

The Respondent, by not objecting or responding to every issue or implied issue raised by the Petitioner, does not intend said omission to be a waiver or acquiescence in Petitioner's argument, but, rather, would leave the appropriate resolution of those issues in the sound discretion of the Court.

I. STATEMENT OF CASE

This is an appeal following a District Court decision acting in an appellate capacity on an administrative appeal by Travelers Insurance Co. (Travelers) of a Final Order of the Department of Insurance (the Department) in favor of Ultimate Logistics, LLC (UL; Respondent) pursuant to the Idaho Administrative Procedure Act. The Department found that the Respondent was aggrieved by the workers' compensation insurance premium rate making process in that the Respondent was charged an excessive premium and that two mechanics were incorrectly included in the Respondents' payroll for premium calculation, because, under Idaho law, they presented no risk of exposure. The District Court affirmed in part, found Travelers' argument that the mechanics were employees and not independent contractors moot, and awarded Respondent attorney fees and costs under I.C. §12-121.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

The issues presented on appeal in Traveler's Opening Brief are insufficient. Respondent asserts the additional issues:

1. The issue of whether the mechanics are independent contractors or employees is moot; Travelers, for purposes of its premium rate determination, treated the mechanics as uninsured subcontractors and not employees.

2. That the Department's Final Order should be affirmed because the Hearing Officer correctly found the premium rate charged to UL by Travelers excessive.

3. That the Department did not act outside its authority.

4. That Travelers raises new issues on Appeal that were not presented below.

5. That the Decision of the District Court, including the award of attorney fees and costs, should be affirmed.

6. Respondent is entitled to attorney fees and costs pursuant to Idaho Code. §12-107, §12-120(3), and/or §12-121.

III. INTRODUCTION

The National Council on Compensation Insurance (NCCI) is a Rating Organization under Idaho Code § 41-1620. "Rating" is a reference to workers' compensation premium rates. The Petitioner, Travelers Insurance (Travelers), is a member or subscriber to NCCI. Both the Scopes Manual and the Basic Manual are products of NCCI and are part of the "rate filings" (Filings) required to be filed with the Department of Insurance (the Department) pursuant to Idaho Code § 41-1606.

The purpose of the Filings are to fulfill two (2) aspects of the declared policy by the state. First, it is in the public welfare that the making of premium rates for workers' compensation should be done in concert with other insurers, and, second, that the review by the State of Idaho through the Department, "of the rates so made are necessary, desirable, and in the public interest." (I.C. § 41-

1602). Idaho Code § 41-1602(c) states that it is in the public's interest that the Department review not only the "rate-making" process, but, specifically, "the results thereof". (I.C. § 41-1602(c)).

> 41-1602. DECLARATION OF POLICY – PURPOSE
> (1) It is declared that the public welfare is served by the making of premium rates for workmen's compensation insurance coverages in concert, and that the review by the state of the rates so made is necessary and desirable in the public interest.
> (2) It is the purpose of this chapter:
> (a) To authorize such rate-making in concert, and the operation of rating organizations relative thereto;
> (b) To establish the general bases and standards for the making of such rates;
> (c) To provide for review by the state of such rate-making and the results thereof. (Emphasis added.)

Idaho Code § 41-1604 provides that the rate so made shall not be excessive, inadequate, or unfairly discriminatory.

Basically, workers' compensation rates are calculated as a percentage of an employee's payroll. The percentage applied depends on the risk assigned to the employer through its classification. NCCI, as a Rating Organization, had submitted its manuals used to determine classification and other aspects of premium determination to the Department, which has accepted the same. All members or subscribers to NCCI must follow the manuals lodged and accepted by the Department when determining premiums. (I.C. § 41-1620(3)).

If a person has been "aggrieved" by the rate making process or its application, they must first seek a review by a resolution board provided by the Rating Organization, in this case, NCCI. The designated NCCI's review board is named "The Idaho Workers' Compensation Appeals Board" and, despite its title, it is not a state agency and is wholly unrelated to the Idaho Industrial Commission. Because the Board's title is misleading, it will be referred throughout the remainder of this

memorandum as the NCCI Review Board (or, the Board). The statutory authority for this Rating Organization's first review for an aggrieved insured is provided for by Idaho Code § 41-1622(2):

> INFORMATION TO INSUREDS – REVIEW OF INSURED'S COMPLAINT
>
> . . .
>
> (2) Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject such request within thirty (30) days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or such insurer on such request may, within thirty (30) days after written notice of such action, appeal to the director, who, after a hearing held upon notice to the appellant and to such rating organization or insurer in accordance with chapter 2, title 41, Idaho Code, may affirm or reverse such action. (Emphasis added.)

Idaho Code § 41-1622(2) applies to the entire "rating system", and also provides the appeal process from a review board's determination, stating that the "party affected by the action" can appeal to the director.

It is UL's position, of course, that UL has been aggrieved by Travelers' application of NCCI's rating system in connection with the insurance afforded UL. UL's grievances follow Travelers' post factum audit of two (2) coverage periods, extending through 2015 and 2016, of UL's payroll. Following the audit, UL received an invoice charging UL an additional $39,000.00 in audited premiums to cover the risks for the two (2) periods that had already passed. (Agency Transcript [ATr] 35, L. 19-23; Mr. Rieser); ATr p. 102, L. 13 – p. 103, L. 6 (Mr. Landino)). It is undisputed that no workers' compensation claims, whatsoever, were filed against UL in the period audited. (ATr. p. 36 L. 14-18; Mr. Rieser). The collected premium for 2015 was $4-5,000.00 and for 2016 $6-7,000.00. (ATr. p. 34, L. 16 – p. 35, L. 24). Shocked and aggrieved by the audit, UL, acting pro-se, requested

NCCI to provide a review on how the premium was determined, a process which the rating organization, NCCI, is statutorily required to provide. (I.C. § 41-1622).

Before the NCCI Review Board, UL disputed the classification and further asserted that the payroll of two (2) mechanics were incorrectly included to calculate the premium base because the two (2) mechanics were independent contractors and not employees. (Agency Record [AR] p. 129; UL's Request for NCCI Hearing; AR p. 12, NCCI Case Summary and Decision; Issue in Dispute, p. 1, Aug. 22, 2016).

Travelers responded that the classification of 7219 was not only correct, but, given UL's new 7219 classification, a trucking operation, the mechanics, as an integral part of a trucking operation, should also be classified as 7219 and included in UL's payroll for the purposes of calculating UL's workers' compensation insurance premium. (AR p. 12, 13, NCCI Case Summary and Decision, Summary of Carrier's Position, p. 1, 2, Aug. 22, 2016. AR p. 126; AR p. 292). Proceeding the hearing before the Board no reference whatsoever was made by Travelers to UL about how Travelers applied NCCI's Basic Manual Rule 2.H-1, 2, and 4.(hereinafter BMR2-H)

NCCI ultimately accepted Travelers' position, citing and reproducing BMR2-H[1] for the first time, underscoring for emphasis that: "In all cases, the payroll determined for subcontractors is assigned to the classification that would have applied if the individuals had been employees of the contractor." (Emphasis in original.) No emphasis was placed by NCCI that BMR2-H only applied to employees of subcontractors. Following the adverse determination by the NCCI Review Board, UL retained an attorney and appealed to the Director of the Department, who appointed a hearing officer to conduct a hearing. (AR p. 1, 2 UL's Appeal and Request for Hearing)

[1] The full text of BMR2-H can be found at pg 23, supra

The Hearing provided to UL by the Department pursuant to Idaho Code § 41-1622(2) is not limited to the issues or facts developed or framed by or before the NCCI Review Board as is argued by the Appellant. Moreover, NCCI's own perception on what it can or cannot review has no binding effect on what part of the rate making process or its application can subsequently be reviewed by the Department, for the Department's authority to review is determined by statute, and not the NCCI.

Idaho Code § 41-1622(2) provides that the Department is to provide the "affected party" a new hearing in accordance with Idaho Code, Chapter 2, Title 41. The Department's broad authority is defined by §41-231 and §41-232:

> I.C. § 41-231. HEARINGS AND APPEAL – SCOPE OF PROVISIONS.
> Except as otherwise provided in title 41, Idaho Code, and to the extent not inconsistent therewith, chapter 52, title 67, Idaho Code, shall apply as to all hearings and as to all appeals from the director relative to any matter treated in this code.
>
> I.C. § 41-232. HEARINGS IN GENERAL.
> (1) The director may hold a hearing which he deems necessary for any purpose within the scope of this code.
> (2) The director shall hold a hearing:
> (a) If required by any provision of this code, or
> (b) Upon written demand for a hearing by a person aggrieved by any act, threatened act or failure of the director to act, or by any report, rule, regulation, or order of the director (other than an order for the holding of a hearing, or an order on a hearing of which hearing such person had actual notice or pursuant to such order). (Relevant portion reproduced only.) (Emphasis added.)

As noted in the statute, the director may hold a hearing which he deems necessary for any purpose within the scope of Title 41.

Idaho Code § 41-231 further incorporates the Idaho Administrative Procedure Act, Idaho Code, Chapter 52, Title 67, which would include the Idaho Rules of Administrative Procedure as adopted by the Idaho Attorney General to apply to agency hearings, which, as correctly asserted by the Department in its Final Order, allows for discovery. (e.g. IDAPA 04.11.01.521 *et seq*; AR p. 91.

Final Order, p. 10.) Therefore, this Petitioner's claim that it was afforded no opportunity for discovery should be disregarded.

The Department's general powers and duties are set forth in Idaho Code § 14-210(1), (2), and (3), and should also be taken into consideration in determining the Department's authority in this action:

> 41-210. GENERAL POWERS, DUTIES.
> (1) The director shall enforce the provisions of this code, and shall execute the duties imposed upon him by this code.
> (2) The director shall have the power and authority expressly conferred upon him by or reasonably implied from the provisions of this code.
> (3) The director may conduct such examinations and investigations of insurance matters, in addition to examinations and investigations expressly authorized, as he may deem proper to determine whether any person has violated any provision of this code or to secure information useful in the lawful administration of any such provision. The cost of such additional examination and investigations shall be borne by the state. (Emphasis added.)

Thus, the Department had broad authority when the Department reviewed Traveler's application of NCCI's rating system to UL's premium audit. Specifically, the Department had the express and implied authority to review all aspects of the rate making process or any other issues that may have arisen as a result of Travelers application of NCCI's Filings to determine UL's premium.

At the commencement of the Hearing, the following issue was defined by the Hearing Officer without objection:

> THE HEARING OFFICER (Jean Uranga): But the issue here today is only whether mechanics need to be covered by the Work Comp policy.
> MR. DEFRANCO: I think that is fair if you boil it down to a bumper sticker.
> MR. MCFEELEY: I think that is probably true. There is a driver. William Stites, who is an employee of Ultimate Logistics that is covered by the code. I don't know if there is an objection to that.
> THE HEARING OFFICER: Okay. As I read the NCCI decision it seems like it was narrowed to mechanics. So I just wanted to clarify that.
> MR. DEFRANCO: That is where the bulk of the controversy is. (Tr., p. 13, L. 2 – 15)

After the hearing and briefing, the Hearing Officer upheld the 7219 classification, and the Hearing Officer determined that the mechanics were independent contractors and not employees (AR 60). The Hearing Officer made the following specific findings in the Preliminary Order in regards to how the premium rating system was applied to UL in regard to the two mechanics:

> "Steve Landino testified Travelers agrees with Mr. Rieser that the mechanics are not employees of Ultimate Logistics and were not required to have workers compensation insurance in Idaho. However, because the mechanics are uninsured subcontractors, Travelers has a risk of exposure and could require workers compensation on the mechanics pursuant to the NCCI Basic Manual Rule 2.H.2. Rule 2.H.1 provides that in states where workers compensation laws provide that a contractor is responsible for payment of workers compensation benefits to "employees of its uninsured subcontractors," the contractor must provide evidence that the subcontractor has workers compensation insurance in force. Rule 2.H.2 then states: "For each subcontractor not providing such evidence of workers compensation insurance, additional premium must be charged on the contractor's policy for the uninsured subcontractor's employees according to subcontractor Table 1 and 2 below." The evidence established that, in May 2016, both of the mechanics purchased workers compensation insurance. Further, there is no evidence that either of the mechanics have any employees. (AR p. 51, Preliminary Order, p. 5.)
>
> . . .
>
> "Travelers conceded through the testimony of Steve Landino that the mechanics were not employees and workers compensation was not required for the mechanics, but could be required to cover these uninsured subcontractors employees. Mr. Landino cited the NCCI Basic Rule 2.H in support of Travelers' position. There is no evidence that either of the mechanics have any employees. In addition, pursuant to Rule 2.H.1[,] each of the mechanics purchased their own workers compensation insurance.
>
> The Hearing Officer concludes the two mechanics are not employees of Ultimate Logistics, are not required by Idaho law to be covered by workers' compensation laws, and they have no employees. Consequently, Travelers cannot require the payment of a workers' compensation premium for the two mechanics." (AR p. 51, Preliminary Order, Conclusion of Law, p. 60.)

The Hearing Officer, therefore, specifically found that Travelers, by applying BMR2-H, conceded the mechanics were not employees but subcontractors.

Travelers thereafter appealed the Hearing Officer's Preliminary Order to the Director. The Director noted the only issue on appeal raised by Travelers as follows:

> "Travelers appeals only the Hearing Officer's conclusion regarding the mechanics and asserts that the Hearing Officer had no jurisdiction under Idaho's Insurance Code to analyze whether the mechanics were employees or independent contractors. Travelers argues that under Idaho Code § 41-1623, a hearing officer is limited to interpreting only whether a classification is applicable to an employer." (AR p. 88, Final Order Denying Appeal, p. 89.)

In the Department's Final Order, after determining the Department had authority to decide the issue, the Department affirmed the Preliminary Order and Findings of the Hearing Officer, noting the following:

> "Lastly, Travelers' own testimony at the hearing made the issue of whether the mechanics were employees or independent contractors arguably moot. Travelers' [sic] admitted through the testimony of Steve Landino that it did not consider the mechanics to be employees. Instead, Travelers asked the Hearing Officer to conclude that the mechanics were "subcontractors" within the scope of Ultimate Logistics' 7219 classification code by virtue of NCCI Basic Manual Rule 2.H.2. Thus, the Hearing Officer's analysis was directed to the classification of the subcontractors as mechanics." (AR p. 82, Final Order Denying Appeal, p. 91.)

The Board agreed with the Hearing Officer that Travelers admitted that it did not consider the mechanics to be employees.

Travelers appealed the Final Order of the Department to the District Court, again arguing that The Department had no authority to determine if the mechanics were employees or independent contractors. The District Court acting in its appellate capacity, found for the Respondent, and awarded attorney fees and costs under I.C. §12-121. This Brief is in response to the Opening Brief filed by Travelers.

IV. STANDARD OF REVIEW

The standard of review for an appeal to the Court is found at Idaho Code § 67-5277 and § 67-5279. Idaho Code § 67-5277 provides as follows:

> 67-5277. JUDICIAL REVIEW OF ISSUES OF FACT. Judicial review shall be conducted by the court without a jury. Unless otherwise provided by statute, judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to section 67-5276, Idaho Code.
> Idaho Code § 67-5279, at the relevant portion is reproduced below:
> "IDAHO ADMINISTRATIVE PROCEDURE ACT
> 67-5279. SCOPE OF REVIEW – TYPE OF RELIEF. (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
>
> . . .
>
> (3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional of statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole;
> or
> (e) arbitrary, capricious, or an abuse of discretion.
> If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceeding as necessary.
> (4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

The Court defers to the agency's findings of fact unless those findings are clearly erroneous. *Ferguson v. Board of County Comm'rs for Ada County,* 110 Idaho 785, 788, 718 P.2d 1223, 1226 (1986). The Court may not substitute its judgment for that of the agency as to the weight of evidence presented in the record. I.C § 67-5279(1); *Woodfield v. Board of Professional Discipline,* 127 Idaho 738, 744, 905 P.2d 1047, 1053 (Ct. App. 1995).

The agency's findings must be affirmed unless the findings are not supported by substantial evidence on the record as a whole or the findings are arbitrary, capricious, or an abuse of discretion.

(I.C. § 67-5279(3)(d)(e)). Substantial evidence is more than a scintilla of proof, but less than a preponderance. *Boley v. State Industrial Special Indem. Fund.*, 130 Idaho 278, 280, 939 P.2d 854,856 (1997). It is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.* An agency's interpretation of its statutes is entitled to deference. *Simplot v. Idaho State Tax Comm'n,* 120 Idaho 849, 820 P.2d 1206 (1991). However, the interpretation of a statute is a question of law, which this Court exercises de novo review. *V-1 Oil Co. v. Idaho State Tax Commission,* 134 Idaho 716, 718, 9 P.3d 248, 252 (2001).

In an appeal from the decision of the district court, which exercised its judicial review authority under the IDAPA, this Court reviews the agency record independently of the district court's decision. *Stafford v. Idaho Dep't of Health & Welfare,* 145 Idaho 530, 533, 181 P.3d 456,459 (2008). However, as a matter of procedure, the Court affirms or reverses the district court's decision. *Williams v. Idaho State Bd. of Real Estate Appraisers,* 157 Idaho 496, 502, 337 P.3d 655, 661 (2014). The Court reviews the decision of the district court to determine whether it correctly decided the issues presented to it *Clear Springs Foods v. Spackman,* 150 Idaho 790, 797,252 P.3 d 71, 78 (2011).

V. SCOPE OF REVIEW

UL disagrees with Travelers argument that this Court's review should be limited to the narrow issues as were phrased by Travelers before the NCCI Board. It is not just a "classification issue." The real issue to be reviewed is already clearly set forth and defined by the statutory framework that creates the right to have a premium rating reviewed in the first place: Was the insured aggrieved by any aspect of the premium rating system in respect to the manner in which such rating system has been applied in connection with the insurance afforded him? (I.C. § 41-1622(2)). "Aggrieved" is a determination of whether the rate so made, as it applied to this insured, was, "excessive, inadequate,

or unfairly discriminatory". (I.C. § 41-1604). Therefore, this is more than simply an appeal from a "classification decision."

VI. NEW ISSUES ON APPEAL

The appellant raises new issues containing subtle differences to the issues that were raised by the Appellant below. Because the differences are subtle, a quick review of the issues raised by Travelers below at the Department and before the District Court is necessary. The Hearing Officer clarified the issue to which all parties agreed; which was whether the two mechanics need to be covered by the work comp policy. (ATr. P. 13, lines 2 to 4). Mr. McFeely, on behalf of Travelers stated, "and the real question is whether ultimate logistics fits within the code *and whether the mechanics are employees or independent contractors"* (ATr, P 11, L 15-18)

In its Post Hearing Brief (AR 33) Travelers argued that the evidence adduced from documents at the hearing was sufficient, "to show that the mechanics are not independent contractors but are in reality employees of Ultimate Logistics." (AR 30; Travelers Post Hearing Brief, pg 2) Travelers legal argument describing the factual elements distinguishing employees from contractors under Idaho Worker's Compensation law goes on to fill 4 pages of its 6 page Post Hearing Brief (AR 34-38), and concludes by asking the Hearing Officer, if it determined the Department had authority to do so, to find that the mechanics are employees, and not contractors. Not once does the Brief reference that Travelers relied on and applied BMRH-2 to the mechanics at audit to include the mechanic's payroll in Traveler's premium calculation or make any reference to Travelers insurance policy language.

In Travelers Appeal from the Findings of Fact, Conclusions of Law and Preliminary Order, Travelers argued to the Director that the hearing officer had "no authority" to review the "coverage issue" of whether the mechanics *were employees or contractors*. (AR 67)

The issues presented to the District Court and now to this Court will be placed together for comparison. In Travelers Petition for Review to the District Court, and in it and memorandum in support thereof, travelers listed the following issues to be determined by the court:

ISSUES PRESENTED ON APPEAL

"1. Does the Idaho Department of Insurance have jurisdiction under Idaho statutes (the Idaho Insurance Code and the Idaho Worker's Compensation Code) to determine whether individual workers are employees or independent contractors for worker's compensation coverage purposes.
2. Whether the Department of Insurance's Final Order incorporating the Hearing Officer's decision is supported by substantial evidence on the record.
3. Whether the two mechanics at issue are employees or independent contractors.
4. Whether the matter should be remanded to the Idaho Department of Insurance to allow additional discovery and fact-finding regarding the coverage issue.
5. Whether substantial rights of travelers were prejudiced by the Department's Order.
6. If any party or entity appears in opposition to Travelers' Petition, is Travelers entitled to costs and attorney's fees under Idaho Code §12-121 as such opposition would be without foundation. Travelers listed the issues presented on this appeal before this Court in Traveler" (Petitioner Travelers Insurance Co.'s Memorandum in Support, Clerk's Record [CR] 46)

In Travelers Insurance Company's Opening Appellate Brief, at page 9, Travelers lists the issues as follows:

"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?
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 prejudice 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 attorney fees to Ultimate Logistics?"

Issues one and three in Travelers brief before the district court sought for a determination on if the Department had the authority to determine whether individual workers are employees or independent contractors for workers (*sic*) compensation purposes, and whether the two mechanics at issue, "*are employees or independent contractors?*" (AR 46). This has consistently been the issue until this appeal.

Travelers has now morphed the issue below, making this appeal more of a declaratory judgment action of first impression on Travelers' insurance policy. By morphing the issue of "contractor vs. employee" raised below to a much broader "coverage issue," asking whether a workers compensation policy can add subcontractors to include them within the risk pool, whether *the policy* allows Travelers to collect premiums for the mechanics, and, seeking remand for discovery on both "the coverage and contract" issues has completely shifted the focus from the Department's actions to one of insurance policy interpretation, when the true focus should be on the rate making procedure the Department is authorized to regulate. Not once before the Department or the District Court were these new issues raised, and the Respondent UL therefore objects to the same. The Appellant should not be allowed to raise new issues for the first time on appeal. Nevertheless, UL is now compelled to respond.

The Appellant's new change of course was no doubt inspired by the discovery of *Compassionate Care Inc. v. Travelers Indemnity Company*, 83 A.3d 647; 147 Conn.App.380. (2013) (Travelers Opening Brief, pg. 16). Before appraising the basis of the *Compassionate Care*'s decision, initially, the Court should take the following points into consideration when considering *Compassionate Care's* application to the present circumstances:

1. *Compassionate Care* is a declaratory judgment action, and it does not involve review of an agency action of any kind whatsoever;

2. *Compassionate Care* does not make any reference to any rating manuals, rules rating plans or classifications, such as those at issue here;

3. That worker's compensation laws vary greatly across the states, and *Compassionate Care* applied Connecticut Worker's Compensation law;

4. *Compassionate Care* does not quote the alleged insurance policy language upon which it relies in reaching its decision thereby depriving following courts of the opportunity to directly compare policy language;

5. We have no idea of the role or authority granted to Connecticut's Department of Insurance is in regards to reviewing complaints of aggrieved insureds about how their workers compensation premiums were calculated;

6. The Connecticut court applies a different standard of review than what applies to Idaho courts in reviewing an agency action under Idaho law.

In addition to the points above, an examination of the actual decision of the *Compassionate Care* court is troubling. First, the court determined that the referral nurses were independent contractors, and not employees, and therefore were not covered by Connecticut Worker's Compensation laws; thus reversing the court below. Nevertheless, the court, apparently on its own, went on to determine that the an uncovered person might still attempt to assert an invalid claim and trigger Traveler's "duty to defend" clause there by creating policy exposure to Travelers that that somehow warranted the inclusion of the non-covered as-a-matter-of-law referral nurses entire payroll in the calculation of *Compassionate Care's* worker's compensation premium, resulting in a $67,000 dollar windfall to the carrier.

It is doubtful that the same result could occur here. First, Travelers Insurance Policy (AR 187) states, "We have no duty to defend a claim, proceeding or suit that that is not covered by this insurance." (Part One, Workers Compensation Insurance, Para C, AR 192). Moreover, provisions of the policy in conflict with Idaho law do not apply, and the entire policy "conforms to the parts of workers compensation law as to benefits payable by this insurance," and "that all terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law." (policy, part one, H. 4,5 and 6; AR 193)

Idaho law expressly in clear and unequivocal language exempts the two mechanics from coverage under our workers compensation law in at least two ways. Both mechanics are single member LLCs, and, although they are indeed independent subcontractors, it is undisputed that neither of the two mechanics had any employees. First, I.C. § 72-102 (12) expressly excludes from the definition of employee any person engaged in any of the excepted employments enumerated in § 72-212." I.C. § 72-212 states that, "none of the provisions of this law shall apply to employment of a working member of...a limited liability company."

Second, the two mechanics are also expressly excluded by application of I.C. § 72-216, which provides that Contractors are only liable to uninsured subcontractor's *employees*, and not to the subcontractor himself. Ergo, since the mechanics were single member LLCs and had no employees during the coverage periods, under Idaho law, they presented no risk.

Nor can Travelers argue that the mechanics "could have hired employees" during the coverage period and have created liability, for the Policy calls for a post-hoc after coverage audit to cover the "actual" risk in the coverage period. (Policy, part five E, Final Premium, AR 196)

When the mechanics are expressly excluded from Idaho's Workers compensations law, then a better analysis of Travelers actual liability under U.L's policy of insurance can be found at another declaratory judgment action *LM Insurance Corporation v. Dubuque Barge and Fleeting Services Company,* No. 17-CV-1035 MAR, United States District Court, N,D, Iowa, Eastern Division (March 8, 2019). In *LM Insurance*, like the mechanics in this case, seamen were expressly exempt from Iowa Workers Compensation law by statute. Relying heavily on *Compassionate Care,* the insurance company argued that the seaman's payroll should be included in calculation of the of the workers compensation premium because, even though they are expressly exempt by law, and not covered by workers comp, they "might" nevertheless assert an invalid claim, which would trigger the insurance companies' duty to defend, and thus create policy liability on the part of the carrier. Relying on this logic, the carrier, after audit, included an additional premium in the amount of $1,290,927.58 plus interest, despite the fact that no claims were brought by seaman during the audited coverage period. *The LM Insurance* court refused to grant the carrier the windfall profit it requested:

> "The Court sees no reason to disagree with Newt Marine's position that coverage is determined at the time of an injury and LM asserts none. Despite how an employee may have been classified to obtain insurance, whether an employee is excluded as a seaman depends on the employee's actual job at the time of injury.

> Similarly, whether an employee owes a premium depends on the employee's actual classification during the policy period. The audit procedures to determine the final premium based on actual classification contemplate this process. The audit procedure allows LM to investigate and address the problem it is complaining about. In other words, by auditing its insured, LM can determine if the premium matches the actual risk it assumed. LM cites *American Zurich Ins. Co. v. MVT Servs. Inc.* for the proposition that "[i]n a retrospective premium audit, the issue is not whether the worker would have certainly been covered had he filed a claim on the insurance policy; rather, the audit is an after-the-fact analysis designed to examine the actual risk which [the insured company] undertook during the policy period." M2011-0266-COA-R3-CV. 2012 WL 3064650, at *12 (Tenn. Ct. App. Jul. 27, 2012) (bracketed information in original).
>
> LM asserts, "Based on Dubuque Barge's own original position, LM Insurance would have to include all seamen in its risk assessment coverage because each could be covered by the Workers' Compensation policy depending on what task the employee was doing at the time of injury." (Doc. 22 at 3.) This overstates the actual risk LM was exposed to. The policy provides for the determination of the final premium after the policy ends "by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy." (Doc 21-3 at 28 (Policy, Pt. Five ¶ E).) LM has audit rights under the policies that allow it to examine and audit all records including "ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data." (*See e.g., Id ¶ G;* Doc. 20-4 at 38 (Policy, Pt. Five ¶ G.).) Presumably this is the type of information LM obtained or could have obtained to create the audit reports shown in pagers 146-191 of Newt Marine's Appendix. (Doc. 20-4 at 146-91.) More to the point, this is the type information that would permit LM to ascertain if Newt Marin's employees—including seamen—were placed in the "proper classifications" to determine the final premium. (*Id.* at 38 (Policy, Pt. Five ¶ E).)
>
> Requiring Newt Marin to pay premiums for workers who were properly classified as seamen but *who might have been reassigned* to covered classifications does not match the "actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and the work covered by this policy." (*LM Insurance infra, pg. 6,7.)*

Likewise, in this action, at no time did the subcontractor mechanics have an employee during the coverage periods, a fact that an audit certainly would have confirmed. This salient fact was recognized by the Director in the Final Order, at page 10, wherein the Director notes, "Travelers audit itself should have produced enough evidence for Travelers to justify the inclusion of the mechanics under Ultimate Logistics classification." (AR 19)

This court should declare the same result here in interpreting and applying Travelers policy to the present action, should it elect to do so. The two mechanics are expressly excluded from workers compensation laws in Idaho, and by utilizing the post coverage audit, Travelers knew or should have known that no actual risk existed to support an increase UL's premiums, for the audit would have confirmed that the mechanics were single person LLCs, and that neither mechanic had any employees, and thus, at all relevant times, created no new additional risk, since Traveler's policy, "conformed" to Idaho Law.

Respondent should be awarded fees and costs for responding to this new issue pursuant to I.C. §12-121.

VII. THE ISSUES OF EMPLOYEE VS. INDEPENDENT CONTRACTOR IS MOOT

Although Travelers' argues that this issue is outside the Department's authority, Travelers spent the majority of its brief before the District Court and the Department arguing that the mechanics are employees and not independent contractors. The problem here, however, as noted by the Hearing Officer and the Department, is that Travelers has never treated the mechanics as employees in the first place, when it audited and increased UL's premium.

Travelers arrived at their conclusion that the amounts paid for the two subcontractor mechanics were to be included in UL's payroll "as if" they were employees for calculation of UL's workers' compensation premium rates based upon the application of Basic Manual Rule 2.H. (BMR2-H)

This is supported by substantial evidence in the record. Mr. Craddock of NCCI testified that Travelers applied BMR2-H to the subcontractors:

> "Q. (Mr. McFeeley) And, Madam Hearing Officer, this is my Exhibit 2 now. It is Basic Manual – Rule 2. Mr. Craddock, I don't know if you have that in front of you.

But as I understand it, it talks about if you will, subcontractors who are working for companies. They are assigned to the classification that would have applied to employees. Is that generally accurate?
A. (Mr. Craddock) I think you are referring to Rule 2 regarding subcontractors; correct?
Q. Yes.
A. Because the rule says that a contractor is responsible for the payment of compensation benefits to employees of uninsured subcontractors. So if you have an uninsured subcontractor they would be considered as employees of the contractor." (Emphasis added.) (ATr p. 68 L. 24 – p. 69 L 13).

Steve Landino, a member of the Special Investigations Unit, Residual Markets Division, Home Office of Travelers (ATr. p. 87 L. 20-25), testified that it was he who investigated UL for potential exposure that was not picked up by the first audit conducted by Mr. Schrenk. (ATr p. 13, L. 13-17 (Mr. Landino); ATr p. 83, L. 1-5 (Mr. Schrenk)). Mr. Landino testified that there was no evidence of insurance for the two mechanics, and therefore, they included the amounts paid to the mechanics to calculate the premiums. (ATr p. 87, L. 4-6.)

Mr. Landino further testified as to why the mechanics were included in the premium at all:

Q. (Mr. McFeeley) So the question that I think the hearing officer had earlier was to the effect of why are the mechanics included in the premium at all?
A. (Mr. Landino) Well, to say that they do not have to purchase Workers' Comp in Idaho is probably a fair statement. But if you refer back to Rule 2-H.2, which is your Exhibit 2, we are picking them up as uninsured subcontractors. They had no insurance. So they might not have had an obligation to buy Workers' Comp, but they were still uninsured subcontractors.
Q. So if they had purchased their own Workers' Compensation insurance, as they could have done under state law presumably, then they would not have been reported under Ultimate Logistics policy; is that correct?
A. If they had their own coverage?
Q. Right.
A. We would probably not have included them. But later on they did purchase policies. Minimum premium policies. And they did not elect coverage. So there is still no coverage for those two individuals.
Q. So to answer the question for the hearing officer, and she can speak for herself obviously, but we are not just – Traveler's was not just reaching out in the blue to bring in people that didn't need to be insured; correct? But under the policy, under the guidelines of NCCI, if they were uninsured, they had to be included within the policy; is that accurate? Or maybe could you explain.

A. That's accurate. And you can also refer to the policy itself. I think you have that as an exhibit. I don't have the exhibit numbers in front of me. But you have the policy as an exhibit. And if you refer to part five, premium of the policy, if you look under letter C, remuneration, number two, all other persons engaged in work that could make us liable under part one of Workers' Compensation insurance of this policy. So if there is exposure for someone working for the insured, and we might have to pay a claim, then we are going pick up that exposure.
Q. So the bottom line is that these mechanics could present a risk or present exposure to Traveler's and that is why Traveler's included them within this policy; is that correct?
A. Correct. (ATr p. 93, L. 16 – p. 95, L. 10). (Emphasis added.)

Therefore, it is Mr. Landino's testimony that the mechanics probably did not need to purchase insurance, but, as uninsured subcontractors, applying "Rule 2-H.2", they could present a risk of exposure which provided the basis for Travelers additional after-audit premium of $39,000.00.

And, additional elicited testimony exists: "Q. (Mr. McFeeley) You just added that additional exposure for the other mechanics who came onboard; is that correct? A. Right. The uninsured subcontractors." (ATr p. 105, L. 9 – 11). (Emphasis added.)

Mr. DeFranco, then attorney for UL, cross-examined Mr. Landino, where, Mr. Landino, again, made it clear that Travelers considered the mechanics as subcontractors and not employees:

Q. (Mr. DeFranco) So I guess what you are saying is that from a discretionary standpoint it was your call as to whether or not 7219 was the –
A. (Mr. Landino) Oh, whether they are independent?
Q. Yes.
A. To me they appeared to be an uninsured subcontractor. These people were working for the insured. They had no coverage. They are working on their vehicles. They are working on their premises.
Q. So I guess another way of asking the question is that from your perspective, you know, Luke Bannon and Justin Scherer are not employees of Ultimate Logistics?
MR. MCFEELEY: Objection. I think that calls for a legal conclusion.
THE HEARING OFFICER: I'm going to allow the question. Because he is testifying about all of these classifications.
THE WITNESS: I said that they were uninsured subcontractors.
Q. (BY MR. DEFRANCO) So the designation of whether or not they are employees or not doesn't have any application in the light of that finding from you in your revision of—

> A. Well, if you refer back to Rule 2-H.2, which indicates you are going to assign an uninsured subcontractor to that same classification as that risk. As a regular employee. (Tr p. 107, L. 8 – p. 108, L. 9). (Emphasis added.)

Thus, when the record is reviewed and distilled down to its relevant core, it is clear that there exists no factual dispute, whatsoever, as to whether the mechanics were employees or independent contractors; there is no issue here that requires judicial determination. Such a determination would have no impact on how Travelers determined UL's premium. The finding that the mechanics were "independent contractors" would still leave them as "uninsured subcontractors" for application of BMR2-H, and Travelers never considered the mechanics as employees.

The law relating to moot cases was well discussed in *Committee for Rational Predator Management v. Department of Agriculture,* 129 Idaho 670, 931 P.2d 1188, 1190 (1997);

> "It is well-established that this Court does not decide moot cases. *See, e.g., Great Beginnings Child Care, Inc. v. Office of Governor,* 128 Idaho 158, 160, 911 P.2d 751, 753 (1996); *Phillips v. Consolidated Supply Co.,* 126, Idaho 973, 975, 895 P.2d 574, 576 (1995); *Moon v. Investment Bd. of the State of Idaho,* 102 Idaho 131, 131, 627, P.2d 310, 310 (1981). In considering the definition of mootness, the Court has held that "a case becomes moot when "the issues presented are no longer live or the parties lack a legal cognizable interest in the outcome.'" *Idaho Sch. For Equal Educ. Opportunity v. Idaho State Bd. Of Educ.,* 128 Idaho 276, 281, 912 P.2d 644, 649 (1996) (quoting *Bradshaw v. State,* 120 Idaho 429, 432, 816 P.2d 986, 989 (1991)). "[A]n issue [or case] is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Idaho Sch. For Equal Educ. Opportunity,* 128 Idaho at 281, 912 P.2d at 649 (quoting *Idaho County Property Owners Ass'n, Inc. v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 315, 805 P.2d 1233, 1239 (1991)).
>
> The pivotal elements of justiciable controversy are as follows:
>
> A "controversy" in this sense must be one that is appropriate for judicial determination. ... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot... The controversy must be defined and concrete, touching the legal relations of the parties having adverse legal interests... It must be real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Idaho Sch. For Equal Educ. Opportunity, 128 Idaho at 281-82, 912, P.2d at 649-50 (quoting *Weldon v. Bonner County Tax Coalition,* 124 Idaho 31, 36, 855 P.2d 868, 873 (1993)).

VIII. BASIC MANUAL RULE 2.H WAS NOT APPLIED FAIRLY

The real issue is to determine if BMR2-H as applied by Travelers fairly defines the risk of exposure to Travelers in light of Idaho's workers' compensation laws and would justify the huge increase in UL's workers compensation premium rate. Both the Hearing Officer and the Department's Final Order found that it did not and that portion of the Department's Final Order and Preliminary Order should be affirmed.

BMR2-H. is set forth below:

Basic Manual – Rule 2. – Premium Basis and Payroll Allocation

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

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

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

. . .

4. In all cases, the payroll determined for subcontractors is assigned to the classification that would have applied if the individuals had been employees of the contractor. (Emphasis added.) (R p. 103, Travelers Exhibit 2).

BMR2-H.1 lists certain documents that "may" provide satisfactory evidence; i.e. a certificate of insurance is not mandatory. Moreover, a "certificate of exemption" is not required by Idaho law; the mechanics were expressly exempted by statute.

BMR2-H. is a rule intended to take into consideration the risk of exposure that exists in those states that have a "statutory employer" law; a law that provides that an employer employing contractors or subcontractors can be found liable for payment of workers' compensation for the contractor's or subcontractor's employees, if the contractor or subcontractor does not have workers' compensation. Idaho's statutory employers law is embodied in Idaho Code § 72-216(1) which provides at the relevant part:

> 72-216. CONTRACTORS.
> (1) Liability of employer to employees of contractors and subcontractors. An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301[,Idaho Code,] in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

First, Idaho Code § 72-216, like BMR2-H, applies only to injuries of employees of contractors or subcontractors, and it is undisputed in this action that neither of the two subcontractor mechanics had any employees. (AR p. 294, UL's Exhibit 2, Scherer, owner, J & H Truck Repair, LLC; AR p. 296 UL's Exhibit 4; Bannon, owner, Bannon's Truck Repair, LLC). Because neither of the mechanics had employees, there would be no additional liability or risk attributable to UL by Idaho Code § 72-216(1), even if they were uninsured.

And, again, both mechanics were single worker/members of LLCs, and, by application of Idaho law, are exempt from Idaho's workers' compensation pursuant to Idaho Code § 72-212(6):

> SCOPE – COVERAGE – LIABILITY

> Idaho Code Section 72-212. EXEMPTIONS FROM COVERAGE. None of the provisions of this law shall apply to the following employments unless coverage thereof is elected as provided in section 72-213, Idaho Code:
> (6) Employment as the owner of a sole proprietorship; employment of a working member of a partnership or a limited liability company; employment of an officer of a corporation who at all times during the period involved owns not less than ten percent (10%) of all of the issued and outstanding voting stock of the corporation and, if the corporation has directors, is also a director thereof.

The fact that both mechanics were single working members of LLCs is, likewise, undisputed. (AR p. 294, Exhibit 2 (Schrenk); AR p. 296, Exhibit 4 (Bannon); AR p. 295, UL's Exhibit 3; AR p. 297 - 299, UL's Exhibit 5, 6, and 7).

Because both subcontractors working for UL had no employees and were exempt from workers' compensation as single working members of an LLC, they presented no risk of exposure. A recognition of this fact was succinctly stated as a rhetorical question by the Hearing Officer:

> EXAMINATION QUESTION BY THE HEARING OFFICER:
> Q. (Hearing Officer) This is Jean Uranga, the hearing officer, I'm still a little confused. So if state law says these mechanics are not required to be covered by Work Comp how can NCCI policy say they must be covered?
> A. (Mr. Defranco) I don't think we are saying that they must be covered if the state law says they don't have to be covered.
> THE HEARING OFFICER: Any further questions in light of that?
> MR. DEFRANCO: No further questions." (Tr p. 77, L. 8-19).

Because they were exempt from coverage, neither mechanic presented additional risk of exposure to Travelers, and it is clear that Travelers incorrectly applied BMR2-H to increase UL's premium rate calculation. Therefore, the Department's Final Order and Preliminary Order should be affirmed for substantial evidence exists on the record that supports the Department's determination that the rates charged UL by Travelers for the subcontractor mechanics resulted in excessive premium rates.

IX. THE DEPARTMENT HAD AUTHORITY

Assuming, arguendo, that the issue of contractor or employee is not moot, then the Respondent would argue that the determination of contractor or employee falls squarely within the Department's implied authority.

The ability to redress an insured aggrieved by an increased premium is solidly vested in the Department. (I.C. § 41-1622). If the review of a premium rate requires determination of contractor or employee status, then the Department has the implied authority to make that determination. (I.C. § 41-210; I.C. § 41-1622; I.C. § 41-1623). If the Department was not allowed to review and correct this injustice, then the insured can be potentially caught in a double-bind, i.e., a surety could *post-factum* charge an increased premium based on the surety's own factual determination of "employee" in an audit, without a governmental body with authority to review. Respondent would argue that any conflict this creates between the Department and other agencies, such as the Idaho Industrial Commission, should be addressed by the legislature, not the courts. Other judicial bodies routinely make legal and factual determinations based on Title 72, particularly when "statutory employer" is raised as an affirmative defense to a claim of liability. See, e.g., *Robinson v. Bateman – Hall, Inc.* 139 Idaho 207, 76, P.3d 951 (2003).

Moreover, Idaho Code § 72–707's grant of exclusive jurisdiction of all questions "arising" under workers' compensation does not apply here. The issues determined by the Department "arise" under Title 41, not Title 72. *See Selkirk Seed Company v. State Insurance Fund,* 135 Idaho 649, 22 P.3d 1028, 1030 (2000).

Respondent also asserts that there is substantial evidence in the record to support the Department's factual findings in that regard, if such a determination is found to be a judiciable controversy.

X. ALLOWING THIS ATTORNEY TO APPEAR WAS APPROPRIATE

Allowing this attorney to appear and argue in this action was within the sound discretion of the Court. If appropriately perceived as discretionary by the District Court, Appellant's argument should be disregarded.

XI. ATTORNEY FEES AND COST ON APPEAL

Respondent is entitled to Attorney Fees and Costs on Appeal pursuant to Idaho Code Sections 12-107, 12-120(3), and/or 12-121. Idaho Code § 12-120(3) applies to commercial transactions. Fees pursuant to Idaho Code § 12-121 may be appropriate given Traveler's argument on appeal that the mechanics are employees, given that Travelers reached its increased premium demand in its audit of UL by determining the mechanics were subcontractors; thus, raising and arguing a moot issue. Moreover, Travelers, in the documentation and statement of claim before the NCCI Review Board, and in the email communications exchanged with Mr. Hughes of NCCI by Mr. Landino, regarding Travelers position at hearing, although it claimed the mechanics were "an integral part of a trucking operation", and therefore included in the "7219" classification, somehow failed to disclose to UL that Travelers included the mechanics as subcontractors by application of Basic Manual Rule 2.H; contained in a required NCCI Filing; a fact that was first brought to light by NCCI in its Case Summary (AR p.118 at 121) and was an issue that was not more fully developed until the hearing before the Department. (Re: Travelers position before the NCCI Review Board: AR p. 122 - 127, 134 (citing rule B.1); AR p. 165 at 166 and 167.) And, after the NCCI Review Board's decision, Travelers has consistently attempted to contain the review by the Department, the District Court, and now this Court to a "simple classification" issue. Moreover, in its Appeal to the Court, Travelers raises

issues for the first time, and attempts to morph this action into declaratory judgement action of first impression. By morphing its issues, Travelers implies that it knew all along the mechanics were subcontractors, and not employees, but that's irrelevant because they should be included to increase the premium by application of the insurance policy "duty to defend" clause. Travelers further attempts to obfuscate that below the "employee vs. independent contractor" was the primary issue raised before both the Department and the District Court (AR 88), arguing only that the Department did not have authority to make that finding, and, if they did, the mechanics were employees.

XII. CONCLUSION

In conclusion, any argument requiring a factual determination of employer or independent contractor is moot, both below and before, this Court. The Department and District Court should be affirmed based upon the admitted fact that the mechanics were subcontractors, and its determination that BMR2-H was applied in a manner contrary to Idaho's workers' compensation laws which resulted in excessive premium being charged to UL. Specifically, the amounts paid the mechanics should not be included as part of UL's payroll for the purposes of calculating UL's premium. The decision of the district court should be affirmed, the award of cost and attorney fees under I.C. § 12-121 upheld, and additional costs and fees should be awarded in this Appeal.

DATED this 20 day of September 2019.

ARMSTRONG & KIRKENDALL, CHTD.

Lawrence E. Kirkendall
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was served upon the following individual(s) this 20 day of September 2019, as indicated below and addressed as follows:

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