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Appeal of A & S Construction Company of its 2007-2008 Workers Compensation Policy Audit Premium

Docket No. W2009-01

Order on the Travelers Insurance Company's Motion to Dismiss

I. Introduction

On April 28, 2009, the A & S Construction Company ("A & S") complained to the Division of Insurance about the audit premium charged by the Travelers Insurance Company ("Travelers") on A & S's 2007-2008 workers' compensation policy. An initial order, issued on April 30, 2009, requested additional information from A & S, set a date for a response from Travelers, and scheduled a prehearing conference for June 30, 2009. A & S submitted its statement with supporting documents; Travelers, represented by Garrett Harris, Esq., filed a response to A & S's statement and a motion to dismiss for lack of jurisdiction. At the scheduled pre-hearing conference, Sean Smith ("Smith"), owner of A & S, represented it.[1] At the conclusion of the conference, A & S and Travelers were asked to provide additional information in order to establish a more comprehensive record. After review of the documents, I find that no facts are in dispute that would require an evidentiary hearing, and am allowing Travelers's motion to dismiss, although for reasons that differ from those it proposes.

A & S has appealed its obligation to pay workers' compensation premiums for individuals without their own workers' compensation insurance coverage who performed services for A & S between February 28, 2007 and June 17, 2007. The relevant material facts are undisputed. A letter from Travelers dated June 15, 2007 ("the June 15 Letter") adjusted the audit premium for A & S's 2006-2007 workers' compensation policy but advised A & S that the exclusion would not apply to any policies it had with Travelers effective after 2/28/07. Travelers contends that its advice applies to the entire payroll underlying the A & S 2007-2008 policy; A & S argues that it should be limited to payroll incurred after A & S received the June 15 Letter because, until then, it was not aware that it could not continue to conduct its business as it had in the past. It interprets a phrase in the June 15 Letter that A & S could expect to be charged

[1] Susan Setlow, an audit manager for Travelers, attended with Mr. Harris.

premium for amounts paid [to these individuals] "going forward" as requiring it to cover only subcontractors who performed services after that date.[2]

This proceeding is A & S's third attempt to obtain its desired result, removal of the audit premium charged by Travelers for the period between February 19 and June 15, 2007. The June 15 Letter has been addressed in two prior proceedings, one before the Workers' Compensation Rating and Inspection Bureau ("WCRIB") and one at the Department of Industrial Accidents ("DIA"). After reviewing the documents submitted by A & S that relate to those proceedings, I conclude that this appeal must be dismissed in part under principles of issue preclusion and lack of jurisdiction, and because the record does not support A & S's argument that Travelers committed an unfair business practice by delaying advice about the concession on its premium for 2006-2007 and its effect on the 2007-2008 policy premium or failing to inform him about changes in the workers' compensation statute relating to self-coverage for independent contractors.

II. Historical Background

The parties submitted documents that establish a chronology for the events preceding this proceeding. Travelers has written workers' compensation insurance for A & S through the residual market at least since 2001, under sequential one-year policies with February 28 effective dates.[3] At the conclusion of each policy term, Travelers audits the insured to determine whether its business classification is correct and the premium accurately reflects the insured's payroll. The audit reviews, among other things, documentation that allows the insurer to determine whether additional premium is due for individuals who perform work for the insured as subcontractors or independent contractors, but are not covered under their own workers' compensation policies.[4]

On April 4, 2007, Travelers physically audited the A & S 2006-2007 policy, and determined that additional premium was due to reflect a classification change for the employer's business and its obligation to provide workers' compensation insurance for subcontractors on its payroll who had not provided satisfactory evidence of their own workers' compensation insurance. Travelers issued a premium audit bill on April 16. On April 17, A & S disputed the audit, specifically as it related to insurance coverage for its subcontractors, noting that the auditor had raised questions about those subcontractors at the initial review. It complained that Travelers was treating its subcontractors' insurance certificates differently in this audit than it had in the 2005-2006 audit. Travelers re-audited A & S in June 2007 and informed it, in the June 15 Letter, that it had eliminated payroll for most of the individuals initially included in the April audit. Travelers explained that payroll for those individuals was correctly included in the audit premium but that, because A & S had relied on actions that Travelers took following its audit of the insured's 2005-2006 policy, it would exclude premium for those individuals from the 2006-2007 audit. Travelers then advised A & S as follows: "[p]lease understand that this exception *will not* apply to any policies you have with us effective after 2/28/07."[5] Travelers

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[2] A & S contends that in response to the June 15 Letter, it changed its operations.
[3] The 2001 application indicates that Travelers had previously written workers' compensation coverage for A & S between June 10, 1998 and October 28, 1999.
[4] The insurer may then adjust premium for the current policy to reflect the audit findings.
[5] The workers' compensation policy had been renewed for the year 2007-2008.

instructed A & S to direct any further dispute about the audit to the Dispute Resolution Unit at the Massachusetts DIA.

On July 26, 2007, Travelers requested from A & S payroll information on specified individuals for the period since inception of the 2007-2008 policy in order to amend the policy to reflect current payroll and avoid any large additional premium on the final audit. By e-mail dated August 21, 2007, A & S declined to provide the information, asserting that it need report only payroll incurred after it received the June 15 Letter. It interpreted language in the June 15 Letter stating that A & S could expect to be charged premium for amounts paid [to these individuals] "going forward" as a limitation on what it should report. A & S also expressed continued disagreement with the decision that its subcontractors are considered employees for workers' compensation insurance purposes, and stated that it was appealing to the DIA.

The DIA determined that A & S disputed inclusion of these subscontractors in its payroll, in part at least, on the ground that they were not in the same business as A & S. On August 27, 2007, it referred the matter to the WCRIB to address the business classification issues. Both A & S and Travelers submitted documents to the WCRIB which, on February 19, 2008, issued an opinion that addressed both the business classification and the status of individuals performing services for A & S.[6] The opinion noted that insurers usually make decisions about independent contractor status at audit, and that the DIA reviews any disputed decisions. In this case, however, because the DIA had referred the entire matter to the WCRIB, it examined all the issues. On the classification issue, the WCRIB concluded that A & S might perform some work unrelated to its principal classification in Code 5703 (Building Raising or Moving), but that it would need to maintain a verifiable payroll breakdown in order to qualify for lower rates for those other classifications.

With respect to the status of the individuals included in the initial 2006-2007 policy audit, the WCRIB considered facts relating to their work, applied the manual rules relating to classification assignments for construction operations and the interchange of labor, and concluded that the "vast majority" of these individuals were not independent contractors and therefore did not qualify for exemption from the requirement that A & S cover them on its workers' compensation policy. It advised that such individuals should be included in all future audits. The WCRIB observed that Travelers had acted appropriately in revising the 2006-2007 premium audit billing, and noted that the insurer had given formal notice advising A & S that *all future audits would include all individuals that did not qualify for exemption*" (emphasis added.) The WCRIB instructed A & S that it should direct any formal appeal to the DIA.[7]

Travelers completed an audit of A & S's 2007-2008 workers' compensation policy on April 18, 2008, including in the premium base payroll for individuals who did not provide A & S with certificates of insurance confirming that they were covered under a workers' compensation policy. The audit generated $10,122 in additional premium charges for the 2007-2008 policy. In a meeting between Travelers and A& S related to that audit, Smith's wife Janny ("Ms. Smith") raised the question of the June 15 Letter and its applicability to the 2007-2008 policy audit. A

[6] The documents supplied by A & S and the WCRIB decision both refer to telephone communications between the WCRIB and Smith or his wife, Janny Smith. The WCRIB reviewed documents submitted by Travelers, but its decision is silent on any oral communications with the insurer.

[7] The documents that A & S supplied do not reflect any appeal to the DIA as a result of receiving the WCRIB decision.

string of e-mails to the DIA followed, which ultimately produced an opinion from the DIA that the statement "you [A &S] can expect to be charged premium for amounts paid to them [individual workers] going forward to mean that the premium for the 2007-2008 policy will include all individuals who do not qualify for exemption as independent contractors." On April 28, A & S objected, disputing inclusion of payroll for the period from February 28, 2007 through June 17, 2007. Travelers declined to revise the audit stating, in a letter dated May 16, 2008, that A & S was well aware of what to expect at the 2007-2008 audit and that the DIA agreed that the June 15 Letter informed A & S that the audit would include payroll for the entire 2007-2008 policy period. Travelers advised A & S that it could appeal its decision on the audit premium to the DIA.

On May 23, 2008, Ms. Smith e-mailed the DIA expressing concern that Travelers would cancel the A & S 2008-2009 policy unless it paid the audit premium. She requested a hearing "in regards to the individual contractor vs. employee dispute however most importantly, the correspondence as seen below which was received in June 2007." [sic] She stated that until A &S received the June 15 Letter it continued to operate in the same manner as it had in the past. A week later, in response to an actual notice of cancellation from Travelers, A & S initiated a proceeding before the DIA under G.L. c. 152, §65B.

Travelers and A & S were parties to that proceeding. The hearing officer held a hearing on August 13, 2008 and, on April 9, 2009, issued a decision finding that the parties agreed that the WCRIB's February 19, 2008 opinion letter settled the question of the independent contractor status of individuals hired by A & S. He found that the only issue to be addressed was the interpretation of the June 15 Letter. The DIA decision sets out the parties' respective positions. Travelers stated that it had given A & S a concession with respect to the 2006-2007 audit and was unwilling to grant any concession on the 2007-2008 policy. A & S, in an e-mail to the DIA hearing officer dated September 23, 2008, stated that it was aware in April 2007, at the time of the audit of the 2006-2007 policy, of an issue with the payroll, but waited until it received the June 15 Letter to change the way it conducted business. It claimed that it was being surcharged for "a period of indecision from February to June", reiterating its interpretation of the "going forward" language in the June 15 Letter to mean that only future payroll would be included.

The hearing officer ultimately concluded that the individuals whose compensation had been included in the audit of the 2007-2008 policy were employees under the workers' compensation law, and that the June 15, 2007 Letter gave A & S a premium concession for its 2006-2007 policy but "provided clear written notice" that the exception would not apply to any policies effective after February 28, 2007. He therefore dismissed A & S's objections to the Travelers audit, and advised A & S that it could appeal his decision to the Suffolk Superior Court. A & S took no such appeal.

III. Analysis

Regardless of the prior rejection of its argument for exclusion from its workers' compensation premium of payroll for uninsured subcontractors between February 28 and June 17, 2007, A & S now reframes the issue, alleging in its complaint to the Division of Insurance ("Division") that the timing of the notice from Travelers is an unfair business practice. It objects to the audit of the 2007-2008 policy, as it did at the DIA, on the ground that Travelers did not inform it until June 15, 2007 that payroll for all individuals without workers' compensation insurance would be included in the premium base for policies effective as of February 28, 2007.

Characterizing the time period between the audit of the 2006-2007 policy and the June 15 Letter as a "period of indecision," A & S seeks the same outcome that it did not obtain at the WCRIB or the DIA: that it should not be required to pay workers' compensation premium on payroll for the first three and a half months of the 2007-2008 policy period because of the "going forward" phrase in the June 15 Letter.

The argument about the interpretation of the June 15 Letter theory that A & S now seeks to pursue at the Division was fully formulated by August 21, 2007, when it submitted its first appeal to the DIA. By refusing to provide Travelers with payroll data for the period between February 28 and June 17, 2007, A & S established its position that its 2007-2008 workers' compensation insurance should not cover individuals performing services for it during that time. Proceedings both at the WCRIB and the DIA to which A & S and Travelers were parties interpreted the time period for which A & S would be expected to provide workers' compensation insurance for otherwise uninsured individuals providing services to it. The WCRIB and the DIA each concluded that the June 15 Letter gave clear notice to A & S that no payroll exception would be made on policies effective after February 28, 2007.

The DIA informed A & S that it could appeal the DIA decision to the Superior Court. A & S declined to take that route, but instead filed a complaint with the Division. The Division has no authority to overrule the DIA's decision. To the extent that the objective of this proceeding is to overturn the DIA's interpretation of the June 15 Letter, it is outside the Division's jurisdiction.

Despite attempts to reformulate the question, the ultimate issue in this proceeding is the interpretation of the June 15 Letter. A & S contends that it was "unfair" for Travelers to notify it in June 2007 that the premium concession granted on its 2006-2007 policy would not be given on the 2007-2008 policy, because it did not give A & S an opportunity to "change its way of doing business." If successful, the argument would effectively accept A & S's position that the June 15 Letter should not apply to payroll incurred during the period February 28-June 17. Such a conclusion would be inconsistent with the conclusion reached by the two agencies that have already considered the matter, in proceedings to which Travelers and A & S were parties.[8]

For the following reasons, I conclude that the evidence does not support A & S's efforts to transform this matter from a dispute about the interpretation of the June 15 Letter to a complaint based on the timing of that letter in relation to the February policy renewal date. Its argument ignores the context of the June 15 Letter which, in response to A & S's objections to its 2006-2007 audit, gave A & S a concession for that year. A & S misreads the focus of the letter—to inform it of the concession on the 2006-2007 policy—and attempts to shift attention to the statement advising A & S that Travelers would grant no future concessions as the timing of the statement relates to the inception date of the 2007-2008 policy. A & S's characterization of the time between the initial and second audit of its 2006-2007 policy as a period of "indecision" fails to acknowledge that A & S requested Travelers to review the initial 2006-2007 audit, a process that required time to complete.[9] The June 15 Letter advising A & S about the concession it received and clarifying that it would not apply to later policies was issued within two months

[8] A & S did not elect to appeal the audit premium to the Division in the first instance.
[9] A & S ultimately received a substantial reduction in the initial 2006-2007 audit premium.

after A & S objected to the policy audit.[10] A & S has presented no legal support for its theory that the timing of the communications from Travelers constitutes an unfair business practice.

I find no merit to A & S's argument that before June 15, 2007 it was unaware of issues relating to insurance coverage for subcontractors. A & S's document submissions demonstrate that it was aware of the underlying issues in this matter, the statutory requirement that employers maintain workers' compensation insurance on individuals who perform services for their business, unless evidence demonstrates that an individual may be excluded in accordance with the statute, and the evidence that insurers examine to determine whether exclusion is permissible, long before the 2006-2007 audit dispute. The coverage requirement was explained to A & S many years ago; Smith's February 13, 2001 application for workers' compensation insurance specifically asked if the company used subcontractors or independent contractors to perform services and explained its potential premium liability if its subcontractors and independent contractors did not have certificates of insurance. A & S indicated on that application that its payroll did not include subcontractors without such certificates.

According to its complaint, A & S has never had employees but only conducts its business through subcontractors who carry their own workers' compensation coverage. The precise issue in the current dispute appears to be what constitutes acceptable evidence that an independent contractor is covered under a workers' compensation policy. At the 2008 DIA hearing, Smith testified that Travelers in the past had accepted certificates showing so-called "if any" insurance policies but that about three years ago that had changed. An auditor informed A & S that Travelers required individuals performing services for A & S to have independent self-coverage workers' compensation policies. Questions about certificates from individuals performing services surfaced in the audit of the A & S 2005-2006 policy.[11] It is apparent that A & S had initial notice of certificate issues well before the 2006-2007; at the prehearing conference Smith stated as well that A & S was made aware of the problems with the exposures under its 2006-2007 policy at the time of the initial audit on April 4, 2007. Despite this information, A & S took no affirmative steps to determine what procedures it, as an employer, should follow to avoid incurring audit premiums.[12]

IV. Conclusion

For the above reasons, I allow Travelers motion to dismiss this matter.

June 30, 2011

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Jean F. Farrington
Presiding Officer

This decision may be appealed to the Commissioner of Insurance pursuant to G.L. c. 26, §7.

[10] A & S would apparently be satisfied only if Travelers had commented on the audit of its 2007-2008 policy before the policy effective date.

[11] At the 2009 prehearing conference, Smith reiterated that he knew that the law had changed, but also asserted that the auditor on the 2006-2007 policy had "changed the rules."

[12] At the prehearing conference, Smith stated that he has an insurance agent, but thought that Travelers should advise him on guidelines relating to workers' compensation coverage. A prudent employer would consult an insurance producer about such issues as coverage requirements and the adequacy of his or her coverage.