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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Applicant,	**Case No.:** (Assigned to the Honorable Robert T. Pusey, in Department 239)
v.	**DEFENDANT 'S CLOSING ARGUMENTS BRIEF**
et al,	Date: July 9, 2013 Time: 10:00 AM Place:
Defendants.	San Bernardino, CA 92408

TO THE ARBITRATOR, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant , hereby submits its Supplemental Responsive Arbitration Brief as follows:

I. THE PARTIES THEIR ATTORNEYS:

Plaintiff

Defendant

Defendant

San Bernardino, CA 92408

II. BRIEF INTRODUCTION:

The difficult part of this case seems to separate the actual issue before this Arbitrator and the preexisting friendships involved so that the first doesn't get affected by the last. Both and , respectfully express their concern but they also reiterate their faith in the system and trust that in rendering his decision the Arbitrator will be fair and impartial abiding by the applicable Statutes the multiplicity of Case Law which has been submitted and not for any other purpose.

There wasn't nearly anything new offered at the Arbitration, other than reiteration of each party's positions and live testimony offered with the sole purpose of addressing the black and white policy at issue.

and hereby summarize and submit its closing argument as follows:

III. STATEMENT OF LAW AND ARGUMENT:

1A. If there is Insurance coverage by adjusted by , does that coverage include class of employees not specified in the policy or premium audit, specifically does it include truck drivers?

Defendant did not submit any evidence (other than self-serving testimony) to overcome the previous arguments addressing the ambiguity of the policy at issue. Ms. , testified that she had read the policy (and so did every one in the case). She testified that she read the section concerning the lusted category covered (and so did every one in the case). She also provided conflicting testimony concerning insuring drivers where she testified that Insurance only insures drivers who only drive 200 miles. No evidence other than her testimony was offered on this point and even if it had offered evidence, that evidence would have been irrelevant as was never provided to when it contracted for insurance although were well aware of the line of business in which it was engaged. Ms. testified of the "risk" involved in insuring drivers over 200 miles. Again, no evidence was provided on this issue nor any verifiable statistics but we were

only supposed rely on her "expertise". Perhaps she is unaware that in California the majority of accidents do not relate to the distances driven, but by many other factors such as drunk driving, cell phone use both talking or even worse texting. Most of the accidents occur with out a connection to a distance of over 200 miles. Further, the 200 mile "limit" seemed to have been chosen randomly as 200 miles one way would multiply to 400 miles round trip. This limit should be considered for what it is worth (irrelevant) to the case. This, especially when the underline issue occurred not because the driver drove over 200 miles or one Thousand (1000) but while the driver suffered a **stroke**.

has addressed that the evidence to be presented was precluded by the Parol Evidence Rule and its position remains.

Defendant did not provide any evidence to overcome the rulings on the cases which it offered in its Supplemental Brief.

remains on the position that Defendant, F took the time to list exclusions in its policy limiting liability where it was felt to be necessary. In doing so it took the time list all exclusions to the EMPLOYERS LIABILITY INSURANCE, section listed in prior Briefing. However, it didn't list any exclusions to the WORKERS COMPENSATION section. Both and the Arbitrator provided their comments that "nearly all policies read the same". At one point, counsel by e made a comment that or , "cannot have its cake and eat it too". The same should apply to it ( ); if its policy is nearly the same as all policies in the industry (as the Arbitrator also commented) and the majority of the cases have found that other classifications are covered even by "adjustment of premiums" then so is this policy. All we expect is that the law be followed regardless of any other extrinsic factors.

Only the highlights of the previously cited cases will be kept as part of these Closing Arguments as they would be cited if the Closing Arguments would have been made orally. To reiterate, the cases citedfavor (and perhaps).

The ruling in *National* stated that "...the policy in question only listed employee classifications of truckmen or chauffer..." and therefore the courts denied the extension of coverage to a worker killed while operating a gasoline shovel. However, it was also pointed out that the policy at issue in *National* contained a, "....rider to the policy that provided ....it did not cover an employee sustaining an injury while engaged in any operation not rated and described in the schedule of operations," i.e, an express exclusion clause. In other words, not only did the Policy in *National* clearly list the classifications covered under the policy but also expressly excluded those that were not rated or described with in the document.

As to the policy at issue in this (our) case, it can be clearly distinguished from that in *National* . Unlike *National*, in the Policy-at-Issue subject to this Arbitration, not only did the Defendants not list limits to the Workers Compensation section its policy but also did not expressly stated that "the policy did not cover classifications other than those listed". It only listed the classification contracted for.

Therefore, *National* is a case which supports in that if there were no exclusions, then the policy should extend to other classifications which were not expressly excluded up to and including truck-drivers if and when determined that employed said category of employees. This regardless if the coverage extends or not to

In the case of *Ocean*, it was found that the policy at issue was ambiguous and had the potential to identify other classifications not expressly listed; and that when that happened, the recourse would be to adjust the premium to include coverage for the other classifications.

Similarly, in our case, the ambiguities in the policy mirror the issue discussed and addressed in *Ocean*. In our case, Defendants own policy opens the door to additional coverage to other classifications in similar manner as in *Ocean* i.e subject to adjustment of premiums.

Page, 33 PART FIVE-PREMUIM, (B) Classifications, it is stated that,

"*Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These Classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly*

described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy."

Therefore, like in *Ocean*, Defendant is and should have been Ordered to provide coverage IF Claimant is found (unlikely) to be employee even if with a premium adjustment.

The same is as to the case of *Pacific Coast*. The court denied the coverage of a mine supervisor who was killed. However this decision was based on the fact that the policy at issue in *Pacific Coast* did not have a clause regarding additional exposures. No such situation exists in our current matter. There is a clause covering additional exposures, and at no point did the Defendant specifically excluded or request that the classification of truck drivers be stricken from this policy.

In *Worsick Street Paving Company*, this case involved the coverage of a worker that was killed while working on a sewer line. The policy in *Worsick* also contained a clause which allowed for additional exposures with an adjustment of the premium and the court was *"...satisfied that it could fairly be held sufficiently broad in its terms to include the work the Worswick Company was doing... were it not for the proviso at the end thereof which expressly excepts certain kinds of work from the effect of the paragraph or clause."* The Court did deny extending coverage, but only because there was a specific clause which stated that *"...this clause shall not cover...construction of sewers."* In other words, the court could have extended coverage to the classification at issue with the remedy to the insurer of adjusting the premiums accordingly but for the fact that the policy itself expressly excluded the category in question.

In our case, there is no specific exclusion for the classification of truck driving from the policy and therefore should Claimant be deemed employee of , his classification should also be covered subject to adjustment to the respective premium.

Same occurs with the case *National Automobile*, where an employee was injured while working on a sewer line. The court denied the extension of coverage because the policy at issue excluded classifications if not expressly listed. This was further cited in, *Fyne v. Industrial Acc. Commission* (1956) 138 Cal.App.2d 467, which distinguished *National Automobile* . In all of

these cases, the exclusion is either listed OR a clause stating that no other classifications will be covered other than those listed.

Similarly, Defendant cited *Stephanson* in support of their argument. In *Stephanson* the court denied that the insurance had any obligation to cover the costs of civil litigation due to the fact that there was an express clause excluding such coverage.

In both of these cases, *National Automobile* and *Stephanson* the policies at issue had specific express exclusions to limit the coverage afforded by the Polices. These cases can easily be distinguished from our case in that the Policy at Issue herein, does not contain any relevant express exclusions regarding classifications, as truck drivers are not mentioned as an excluded class anywhere in the Policy.

Also, Defendants cite the case *Paulson*, in which the court denied extension of coverage to a Classification (to the Claimant) where the company had been in business for 20 years and it did not include said Claimant's Classification therefore there was clear intent not to cover said Classification.

In our case, unlike *Paulson*, was rather a new business in 2007 and may have not known then what if any other classifications would be necessary to the operations of the business. Therefore, if found to be an employee, the Claimant in this matter would be the first such employee for this rather new company, therefore his classification would be considered a new venture and therefore can be covered under the Policy at Issue.

Further, Defendants cite the case of *Fremont* where the court denied coverage to a contractor working on a doctor's roof when the doctor tried to cover him under his business policy. The court was correct in doing so. The contractor was employed by the doctor as a private individual, not in his professional capacity as a Doctor.

In our case, Defendants and , if found to be employers, will also be found to have employed Claimant through the business in relation to the business, not for a private employment matter. Therefore the Claimant would be covered.

has lastly cited *Royal Insurance v. Workers' Compensations Appeals Board* (Shulda) (1996) 62, Cal. Comp. Cas 181 as a "case on point". However, as they pointed out, this

case is unpublished, and therefore "may not be generally cited or relied upon in any other action" according to *Miceli v. Jacuzzi, Inc.*, et. al. (2006) 71 Cal. Comp. Cases 599. These Responding parties will not waste the Arbitrator's time in distinguishing this case.

As the cited cases have demonstrated, the insurance industry –a premium driven industry- seems to customize their policies to expand coverage to other classifications understanding that their clients (the employers) often add new positions within their companies. Indeed in almost every cited case (by the Defendants), the policy at issue within the case, had a clause that would allow for coverage of new classifications as long as the premiums were adjusted accordingly. It is clear that the courts routinely expand coverage unless the classifications at issue were expressly excluded. This was not the case here.

1B. If was licensed in the State of California and not in Utah, does the policy provide coverage for Utah Injuries?

Both and even the Arbitrator made several comments on this section distracting the real issue here and somehow confusing the facts implying that should have notified that it was "conducting business in Utah". This was simply not that case and remains not to be the case. Indeed, and continue to only conduct business in California, the Claimant made a trip to Utah that does not mean that had begun establishing permanent or semi-permanent operations there. While it is true that the policy clearly states in section 3C of the Policy states "NO COVERAGE AFFORDED TO OTHER STATES." This language is irrelevant to the issue in lights of the specific statute which cannot be ignored by either and or Arbitrator in submitting his ruling.

California Labor Code § 3600.5 (a), clearly states in relevant part that,

> *"If an employee who has been hired or is regularly employed in the state receives personal injury by accident arising out of and in the course of such employment outside of this state, he, or his dependents, in the case of his death, shall be entitled to compensation according to the law of this state."*

Any interpretation contrary to the statute will be not only gross a mistake of fact but specifically a mistake of law.

It is irrelevant where Claimant's injuries occurred. If found to have been an employee of (or), under the policy which been argued to be open to other classifications, an employed in the state of California should be covered under the present policy.

1C. Is the existence of a multi-state endorsement that included Utah not applicable when does not write insurance involving interstate trucking?

In light of the previous argument and considering that the live witness didn't provide any evidence other than reiterating the terms of the policy, her testimony should not have any baring in the ruling. Specifically as it is precluded from evidence under the Parol Evidence Rule.

California Code of Civil Procedure §1856(a), codifies the parol evidence rule as follows:

> *"Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."*

In other words, C.C.P. 1856(a) bars resort to evidence of a prior agreement or a contemporaneous oral agreement to contradict a fully integrated agreement. Therefore, all evidence must be based on the terms within the four corners of the Policy-at-Issue. Within this policy there are no exclusions for truck-drivers, and therefore it can be presumed that truck-drivers are a covered classification.

1D. Has it been proven that endurance would not have written the policy for if the alleged employer had properly represented the exposure for interstate trucking?

Same argument is made to this section as in the three previous section. Case law and statutes favor the coverage of other classifications if found that or employed other employees as part of doing business in CA. Any evidence contrary to Case Law or statute is irrelevant and should be disregarded.

IV. CONCLUSION:

and believe that the law favor the coverage of any other classifications should it be found that Claimant is their employee which is highly

doubtful yet, the issue remains pending. For purpose of this Arbitration, if the case law is followed and the statutes observed, the ruling should only be to allow coverage, if necessary.

Respectfully Submitted,