

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



FILED  
OSAH

DEC 19 2012

ATLANTA CONTRACT GLAZING,

Petitioner,

v.

FCCI INSURANCE GROUP,

Respondent.

Docket No.:

OSAH-INS-DEN-1309754-33-Miller

*K. Westray*  
Kevin Westray, Legal Assistant

INITIAL DECISION  
ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DETERMINATION

I. SUMMARY OF PROCEEDINGS

This matter is an appeal by Atlanta Contract Glazing ("ACG" or "Petitioner") to the Commissioner of Insurance ("Commissioner"), requesting the reversal of a decision of the Georgia Workers' Compensation Appeals Board. The dispute involves the appropriate method for calculating the workers' compensation insurance premium paid by ACG to its insurer, FCCI Insurance Group ("FCCI" or "Respondent"). ACG seeks an order directing FCCI to omit certain year-end payments to employees from ACG's premium basis calculation. The Commissioner of Insurance has referred the case to the Office of State Administrative Hearings for determination.

On October 19, 2012, both ACG and FCCI filed motions for summary determination. Each party thereafter filed a response in opposition to the other's motion. The record was complete on November 19, 2012, with the filing of reply briefs. After consideration of the parties' arguments and submissions, and for the reasons stated below, the Court finds that FCCI correctly calculated the workers' compensation insurance premiums owed by ACG. Accordingly, FCCI's motion for summary determination is **GRANTED**, and ACG's motion for summary determination is **DENIED**.

## II. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by Office of State Administrative Hearings (“OSAH”) Rule 15, which provides, in relevant part:

A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party “is entitled to a judgment as a matter of law on the facts established.” Pirkle v. Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at \*6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); See generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is “similar to a summary judgment” and elaborating that an administrative law judge “is not required to hold a hearing” on issues properly resolved by summary determination.)

Further, pursuant to OSAH Rule 15:

When a motion for summary determination is supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(3). See Lockhart v. Dir., Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at \*3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).



### III. FINDINGS OF UNDISPUTED MATERIAL FACT<sup>1</sup>

1.

FCCI has issued workers' compensation policies to ACG for terms beginning in 2008 and thereafter. The dispute in this case involves two policies: one covering the period from September 2009 through September 2010, and the other covering the period from September 2010 through September 2011. (FCCI's Statement of Material Facts ["FCCI's Undisputed Facts"] ¶ 6.)

2.

FCCI issues workers' compensation policies based on payment of an estimated premium. The final premium is calculated at the end of the policy term based on the actual exposure insured against during the term. (FCCI's Undisputed Facts ¶ 1.)

3.

FCCI conducts audits of its insureds to determine each insured's actual exposure for the policy period. For the purpose of workers' compensation policies, the exposure is measured in part by the insured's total payroll or remuneration for the policy term. Thus, to determine the actual payroll or remuneration, FCCI's auditor reviews the insured's financial records to calculate the total amount paid for labor during the policy term.<sup>2</sup> (FCCI's Undisputed Facts ¶ 2.)

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<sup>1</sup> Neither party has disputed the other's proposed undisputed material facts. Therefore, the Court has endeavored to integrate and streamline both parties' submissions into a coherent narrative.

<sup>2</sup> In addition to payroll or remuneration, the policy premium is also calculated based on the applicable classification code for the type of work performed by the insured. (FCCI's Undisputed Facts ¶ 3.)

4.

FCCI follows the Basic Manual for Workers' Compensation and Employers Liability Insurance published by the National Council on Compensation Insurance ("Basic Manual")<sup>3</sup> to calculate premium. The Declarations page of the policy issued by FCCI to ACG states, in pertinent part:

4. The premium for this policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plans. All information required below is subject to verification and change by audit.

The Basic Manual is part of the "Manuals of Rules" referenced in the Declarations page of the policy. (FCCI's Undisputed Facts ¶ 5.)

5.

When FCCI audited the 2008 policy issued to ACG, it identified a large sum of payments to employees that were labeled as "severance." According to Basic Manual Rule 2.B.2.e, severance is not considered "payroll" for purposes of computing the exposure base. Severance payments therefore do not impact the premium charged. (FCCI's Undisputed Facts ¶¶ 7, 9.)

6.

The payments at issue are made at the end of each year to ACG's union glaziers, based on the difference between the estimated and actual number of hours required to complete the jobs performed by the glaziers. More specifically, ACG bids jobs based on estimated man-hours. If the job is completed in less than the estimated number of hours, ACG pools its cost savings. At the end of the year, ACG makes payments to its glaziers from this fund. (ACG's Undisputed Facts ¶¶ 5-6; FCCI's Undisputed Facts ¶ 8.)

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<sup>3</sup> In most states, including Georgia, the National Council on Compensation Insurance is considered the authority on workers' compensation insurance. The Basic Manual is recognized in Georgia and has been approved by the Georgia Department of Insurance. The Basic Manual defines certain terms and establishes the method of calculating premium. (FCCI's Undisputed Facts ¶¶ 4-5.)



7.

ACG considers these year-end payments a severance benefit because they are made at or near the termination of the glaziers' employment. The company terminates all glaziers at the close of each year and rehires them as needed for the following year. ACG is not obligated under a binding agreement to make these payments to its glaziers. (ACG's Undisputed Facts ¶¶ 7-11.)

8.

FCCI does not characterize the payments as severance. Instead, FCCI has determined that the payments should be included in ACG's payroll as either "bonuses including stock bonus plans" pursuant to Basic Manual Rule 2.B.1.c. or as "[p]ayment to employees on any basis other than time worked, such as piecework, profit sharing or incentive plans" pursuant to Basic Manual Rule 2.B.1.g. FCCI agreed to exclude the payments from the payroll base for the 2008-09 policy, but informed ACG that they would be included in its payroll beginning with the 2009-10 policy.<sup>4</sup> (FCCI's Undisputed Facts ¶¶ 9-10.)

9.

The inclusion of ACG's year-end payments to its glaziers in the premium basis calculation will increase ACG's premium by approximately \$60,000.00. (ACG's Undisputed Facts ¶ 4.)

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<sup>4</sup> FCCI further agreed to apply a lower classification rating to the payments under the 2009-10 policy. (FCCI Undisputed Facts ¶ 10-11.)

#### IV. ANALYSIS

Under Georgia law, an insured who is aggrieved by the rate charged by an insurer may request a hearing before the Commissioner. O.C.G.A. § 33-9-26. If the Commissioner finds good cause to believe that the insurer has failed to comply with applicable regulations and standards governing insurance rates, he may direct the insurer to correct the noncompliance. O.C.G.A. §§ 33-9-26, 33-9-27. In this case, ACG has appealed to the Commissioner, contending that FCCI improperly calculated its workers' compensation insurance premium by including year-end payments to glaziers in its payroll base. However, this Court finds, based on the undisputed facts set forth above, that the payments at issue were correctly categorized as either bonuses or profit-sharing, and were properly considered part of ACG's payroll. Accordingly, FCCI is entitled to judgment as a matter of law.

Both parties agree that the premium calculation is governed by the contract between the parties, which incorporates the terms defined in the Basic Manual. Under the Basic Manual, all payments that meet the definition of "payroll" must be included in the premium base. The term "payroll" is defined as "money or substitutes for money," and specifically includes the following:

- a. Wages or salaries (including retroactive wages or salaries).
- b. Total cash received by an employee for commissions and draws against commissions.
- c. Bonuses including stock bonus plans.
- ...
- g. Payment to employees on any basis other than time worked, such as piecework, profit sharing or incentive plans. . . .

Basic Manual Rule 2.B.1. Here, the payments in question are made by ACG to its union glaziers as a reward for their efficiency and profitability during the calendar year. Consequently, they



must be characterized as “bonuses” or “profit sharing” under the plain language of the contract and Basic Manual Rule 2.B.1. The payments must therefore be included in ACG’s premium base as part of its payroll.

The Basic Manual excludes certain other types of payments from the definition of “payroll.” According to ACG, its payments to its glaziers fall within one of the following exclusions:

- a. Tips or other gratuities received by employees[.]  
...
- d. The value of special rewards for invention or discovery.
- e. Dismissal or severance payments except for time worked or vacation accrued. . . .

Basic Manual Rule 2.B.2. However, ACG’s characterization of the payments is not accurate.

ACG argues, first, that the payments should be excluded from payroll as “severance payments,” pursuant to Basic Manual Rule 2.B.2.e. This argument is not persuasive. Although it is undisputed that both the payments in question and the termination of the glaziers’ employment occur at or near the end of each calendar year, this fact alone does not support the conclusion that the payments should be considered severance. “Severance pay” means “an amount paid to an employee upon dismissal or discharge from employment.” Oxford Online Dictionary, <http://oxforddictionaries.com/us/definition/english/severance+pay> (Dec. 13, 2012). ACG’s payments to its glaziers are unrelated to the employees’ discharge; instead, the payments are based on the cost savings achieved on jobs over the course of the year. Further, to the extent ACG immediately rehires glaziers as necessary to complete jobs, the glaziers do not experience a traditional separation from their employment for which severance pay might be expected.

Accordingly, the payments are not properly considered “severance payments” within the meaning of Basic Manual Rule 2.B.2.e.

Alternatively, ACG contends that the payments should be excluded from payroll as “special rewards for invention or discovery,” under Basic Manual Rule 2.B.2.d. In support of this argument, ACG cites evidence that NCCI has interpreted “invention or discovery” to include a “process which streamlines [a] company’s procedures.” Basis of Premium Course, “Special Rewards,” at 18 (Exhibit P-F). This argument strains credulity. The record contains no indication that the glaziers have streamlined any of ACG’s processes; they have merely been rewarded for working more quickly than estimated when ACG bid on the jobs it was hired to complete. This is simply not an “invention or discovery” that would justify the exclusion of the payments from ACG’s premium calculation.

Finally, ACG argues that the payments are “tips or gratuities” paid to its workers in accordance with Basic Manual Rule 2.B.2.a. ACG cites the Oxford Online Dictionary, which defines “gratuity” as “a sum of money paid to an employee at the end of a period of employment.” Oxford Online Dictionary, <http://oxforddictionaries.com/us/definition/english/gratuity> (Dec. 13, 2012). However, this is the British definition of the term, and it is inapplicable here. The American English version of the Oxford Online Dictionary defines “gratuity” as “a tip given to a waiter, taxicab driver, etc.” Oxford Online Dictionary, [http://oxforddictionaries.com/us/definition/american\\_english/gratuity](http://oxforddictionaries.com/us/definition/american_english/gratuity) (Dec. 13, 2012). In this country, gratuities are paid by third parties, not employers: waiters receive tips from diners, and taxicab drivers receive tips from passengers. Thus ACG’s payments to its workers cannot be characterized as “tips or gratuities” under Basic Manual Rule 2.B.2.a.

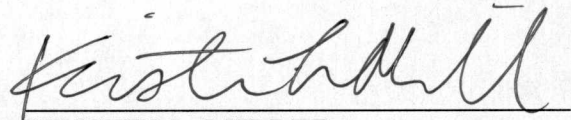


ACG's year-end payments to its union glaziers are appropriately categorized as "bonuses" or "profit sharing" under Basic Manual Rule 2.B.1, and the payments must be included in ACG's payroll for the purpose of calculating its workers' compensation insurance premium. Accordingly, FCCI is entitled to judgment as a matter of law.

**V . DECISION**

For the reasons set forth above, FCCI's Motion for Summary Determination is hereby **GRANTED**, and ACG's Motion for Summary Determination is **DENIED**.

**SO ORDERED**, this 19<sup>th</sup> day of December, 2012.

  
**KRISTIN L. MILLER**  
**Administrative Law Judge**