

For the reasons set forth below, the Board's decision is hereby **AFFIRMED IN PART** and **REVERSED IN PART**.

II. FINDINGS OF FACT

1.

Petitioner John Bartlett is a carpenter. For a number of years, Bartlett, his sons, stepsons, and family friends built churches and houses in and around Georgia. According to Bartlett, he shared the income from the carpentry work with his family members and other workers who assisted him. (Testimony of Petitioner; Ex. R-4, at 2.)

2.

Prior to 2005, Bartlett and the other workers each obtained separate workers' compensation insurance policies in connection with their carpentry work, at a cost of approximately \$700.00 per policy. At some point, Bartlett was told by a person in the insurance industry that separate policies were unnecessary because family members working together were excluded from workers' compensation law. Relying on this advice, Petitioner and his relatives stopped applying for separate policies. Rather, Petitioner alone obtained workers' compensation coverage as a sole proprietor. (Testimony of Petitioner; Ex. R-4, at 2.)

3.

On or about May 22, 2006, Bartlett signed a Workers Compensation Application, prepared by Edward Evans of the Conner Agency. The application indicated that Bartlett was an individual applicant, as opposed to a partnership or corporation, and that he had "0" full-time employees. As a sole proprietor, the application indicated that Bartlett was electing to be excluded from coverage. The estimated annual premium on the application was \$750.00. (Testimony of Howell, Petitioner; Ex. R-5, at 5-8.)

4.

The application contained a supplemental section, entitled the “Workers Compensation Insurance Plan Assigned Risk Section,” also dated May 22, 2006 and signed by Bartlett. The Assigned Risk Section indicated that the applicant had been refused coverage by five insurance companies and was seeking workers compensation coverage through the Georgia Workers’ Compensation Assigned Risk Insurance Plan (“Assigned Risk Plan”).² Under the Assigned Risk Plan, the National Council on Compensation Insurance (“NCCI”), which administers the Assigned Risk Plan for the Georgia Department of Insurance, made an assignment of the coverage to AmTrust.³ (Testimony of Howell; Ex. R-5, at 7-8.)

5.

On or about May 23, 2006, Amtrust issued Policy # TARGA02696 to Bartlett. The policy period was from May 23, 2006 to May 23, 2007, with an estimated minimum premium of \$750.00 (“2006 Policy”). The estimated premium was based on the information contained in the application, including the type of work performed and the number of employees. The 2006 Policy provided that “[t]he final premium would be determined after this 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. If the final premium is more than the premium you paid to us, you must pay us the balance.” (Testimony of Howells; Ex. R-7.)

² Although Bartlett signed this supplemental section, he testified that he was unaware that he had been denied coverage by other insurers or that his application was being processed through the Assigned Risk Plan. (Testimony of Petitioner.)

³ See generally O.C.G.A. § 34-9-133; Ga. Comp. R. & Regs. 120-2-38-.01; USF&G v. Paul Ass., Inc., 230 Ga. App. 243 (1998); Amtrust N. Am., Inc. v. Smith, 315 Ga. App. 133 (2012).

6.

The Information Page of the 2006 Policy indicated that Bartlett was operating his business as an individual. It did not include any "Additional Named Insureds" and estimated Bartlett's annual payroll as \$0.00. The Information Page provided, however, that "[a]ll information required for rating and underwriting is subject to verification and change by audit." In addition, the policy also provided that Bartlett would allow Amtrust to examine and audit his records. Under the terms of the 2006 Policy, Amtrust could audit Bartlett during the policy period and within three years after the policy period ends and that "[i]nformation developed by the audit will be used to determine final premium." (Testimony of Howells; Ex. R-7.)

7.

Amtrust contracted with outside auditors to perform audits of its policyholders. In or around June 2007, Essential Premium Audit Solutions assigned an auditor, Sonja Renfroe, to conduct an audit of Bartlett's business for Amtrust. Renfroe made a number of attempts to reach Bartlett by telephone to set up an appointment. Renfroe eventually had a discussion by telephone with Bartlett, but was unable to meet with him in person before she left her employment with Essential Premium Audit Solutions, sometime in August 2007. According to Renfroe, during her telephone conversation with Bartlett, he described his business, including the payroll amounts paid to his family members. Renfroe further testified that she documented this information in her report to Essential Premium Audit Solutions. She also recommended to her superiors that they assign another auditor to continue with the audit after she left her employment. (Testimony of Howells, Renfroe; Ex. R-5, at 9.)

8.

Essential Premium Audit Solutions did not follow Renfroe's suggestions. Rather, Essential Premium Audit Solutions prepared an audit report on Bartlett that did not include any of the information provided to Renfroe regarding Bartlett's business or payroll. Essential Premium Audit Solutions marked the audit as "unproductive" and forwarded it to Amtrust on or about July 18, 2007. Based on the lack of information in the audit, Amtrust was unable to adjust the premium amount for the 2006 Policy period. Nevertheless, Amtrust, which had renewed Bartlett's workers' compensation policy for the policy period of May 23, 2007 to May 23, 2008 under the same terms as the 2006 Policy ("2007 Policy"), did not cancel or otherwise modify Bartlett's policy for the current policy period. In fact, when the 2007 Policy was set to expire, Amtrust renewed Bartlett's workers' compensation policy for a third policy period, from May 23, 2008 to May 23, 2009, under the same terms as the two previous policies ("2008 Policy"). (Testimony of Howells.)

9.

In or around June 2008, Amtrust retained another audit firm, Overland Solutions, to conduct an annual audit of Bartlett's business. Overland Solutions' auditor, Holly Sisson, reported that she sent a few letters and called Bartlett a few times, but was unable to schedule an audit meeting with Bartlett during July because he was working out of town. On July 24, 2008, Overland Solutions reported to Amtrust that the Bartlett audit had been "unproductive." In October 2008, Overland re-opened the audit. Bartlett met with Sisson during October, and provided financial and tax records for her to review. On October 30, 2008, Sisson prepared a second audit report, which indicated that Bartlett "pays two of his sons cash to help with labor operations. He stated that he did not believe that his sons would be included since they are

relatives” According to Sisson’s October 2008 audit report, Bartlett’s documentation regarding the amounts paid to his sons consisted of the Form-1099s he filed with his federal income taxes. Specifically, Bartlett’s tax forms indicated that in 2007, he paid a total of \$103,500.00 to his sons. Bartlett did not have records to document how much he paid his sons during the policy period. (Testimony of Howells, Petitioner; Ex. R-5, at 10-13.)

10.

There is no probative evidence in the record to prove that Amtrust took any action upon receiving the October 2008 Overland Solutions audit report. It did not cancel the policy based on the new information, require Bartlett to provide additional information, or otherwise notify Bartlett that his final premium would be adjusted to take into account the payroll paid to contract workers. Instead, at the end of the 2008 Policy term, in May 2009, Amtrust sent Bartlett a renewal policy for the period of May 23, 2009 through May 23, 2010 (“2009 Policy”), and he paid the minimum premium calculated by Amtrust of \$850.00. (Testimony of Howells, Petitioner.)

11.

In July 2009, Amtrust retained NEIS, Inc. to reopen the audit on Bartlett, beginning with the 2006 Policy. On July 2, 2009, an NEIS auditor met with Bartlett and reviewed his financial records. NEIS determined that Bartlett paid contract labor a total of \$113,006.00 from May 23, 2006 to May 23, 2007.⁴ NEIS determined that Amtrust’s actual exposure under the 2006 Policy was more than estimated due to Bartlett using uninsured contractors. NEIS made similar findings as to the 2007 Policy and the 2008 Policy, determining that Bartlett paid his two sons a

⁴ Two of the workers were Bartlett’s sons or stepsons, Joshua and Michael, who received \$65,000.00 and \$41,600.00, respectively. The third worker was Dawayne Ingram, a family friend, who was paid \$6,406.00.

total of \$103,500.00 during the 2007 Policy period and paid his two sons and another worker a total of \$\$87,170 during the 2008 Policy period. (Testimony of Howells; Ex. R-5, at 14-25.)

12.

Workers' compensation premiums are based primarily on two factors: (1) a business' annual payroll and (2) an NCCI-established rate for the particular job category or classification. A job classification with a high risk of injury will have a higher rate than a job with a lower risk for injury. Amtrust calculated Bartlett's final premiums based on his annual payroll over the three policy terms, the NCCI applicable rate for carpentry and framing work during each of those terms, and other applicable charges, as follows:

<u>Policy Year</u>	<u>Annual Payroll</u>	<u>Audited Premium</u>	<u>Additional Premium Owed⁵</u>
2006	\$113,006	\$45,578	\$44,828
2007	\$103,500	\$43,468	\$42,703
2008	\$87,170	\$45,070	\$44,203

Finally, Amtrust used Petitioner's past payroll amounts to calculate the estimated premium Bartlett owed for the current policy year, which ran from May 23, 2009 through May 23, 2010 ("2009 Policy"). According to Amtrust, Bartlett's additional premium for the 2009 Policy was \$43,239.00. However, because Amtrust cancelled Bartlett's 2009 Policy for non-payment on September 12, 2009, Amtrust pro-rated the amount of payroll for the coverage period from May 23, 2009 through September 12, 2009, determining that Bartlett owed \$12,824.00 in additional premium based on an estimated \$26,761.00 of payroll prior to the cancellation of the 2009 Policy. (Testimony of Howell; Ex. R-5, at 26-32.)

⁵ Amtrust deducted the amount of premium Bartlett had already paid for each policy from the audited premium to calculate the additional premium allegedly owed by Bartlett.

13.

Amtrust's representative at the administrative hearing, Mary Howell, acknowledged that Amtrust's auditors had knowledge of Bartlett's business operations, contract workers, and payroll practices following the first and second annual audits and that Amtrust failed to take timely action on the audit reports. Howell admitted that Amtrust shared some responsibility for the underpayment of premiums by Bartlett for workers' compensation coverage. As a result, Amtrust has decided not to pursue the additional premiums allegedly owed for the 2007 Policy or the 2008 Policy. However, Amtrust contends that Bartlett failed to accurately disclose the contract workers and their payroll in his original application for workers' compensation insurance and that he is obligated under the terms of the policy to pay the adjusted premium for the 2006 Policy period in the amount of \$44,828.00. In addition, Amtrust contends that Bartlett should pay the prorated amount of premium for the 2009 Policy, currently calculated as \$12,824.00 based on payroll estimates. (Testimony of Howell; Ex. R-6, at 6.)

14.

Bartlett appealed Amtrust's decision to assess back premiums for the 2006 Policy and the short-term 2009 Policy to the Board. Bartlett and Amtrust presented evidence to the Board on October 20, 2010. On October 28, 2010, the Board issued a letter, summarizing the evidence and positions of the parties and finding that "Amtrust properly charged for the 2006 policy period, properly removed all premium for the 2007 and 2008 policy periods and should revise the audit for the 2009 policy period to include prorated payroll for the short term; or include actual payroll if Mr. Bartlett complies with the request to audit." The parties were also advised of their right to make a written request for a hearing on the Board's decision with the Commissioner of Insurance under O.C.G.A. 33-9-26. After considerable and unexplained delay,

Bartlett's request for a hearing on the Board's decision was forwarded by the Commissioner to OSAH for hearing.

III. CONCLUSIONS OF LAW

General law

1.

AmTrust bears the burden of proof to demonstrate that it acted reasonably and in good faith in assessing retroactive premiums. *Benton Express v. Royal Ins. Co. of Am.*, 217 Ga. App. 331, 333 (1995); *Home Ins. Co. v. Sunrise Carpet Indus.*, 229 Ga. App. 268, 271-272 (1997). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

"The Commissioner may hold hearings for any purpose within the scope of [Title 33, the Georgia Insurance Code] as he may deem necessary." O.C.G.A. §§ 33-1-1, 33-2-17(a). Furthermore, "[a]ny person aggrieved by any rate charged, rating plan, rating system, or underwriting rule . . . may file a written complaint and request for hearing with the Commissioner." O.C.G.A. § 33-9-26. The Commissioner referred the case to OSAH for a hearing on the merits pursuant to the Georgia Administrative Procedures Act. O.C.G.A. §§ 50-13-2 (1) (definition of "agency"), 50-13-41(a)(1). OSAH has "all the powers of the referring agency" and may take any action available to the Commissioner. O.C.G.A. § 50-13-41(b).

Contract interpretation principles

3.

"Insurance in Georgia is a matter of contract." *Cole v. Life Ins. Co.*, 236 Ga. App. 229 (1999) (citing *Richards v. Hanover Ins. Co.*, 250 Ga. 613 (1983)). As is generally true in

contract law, insurance policies using language that is “plain, unambiguous, and capable of only one reasonable interpretation” cannot be construed by the court. *Cincinnati Ins. Co. v. Davis*, 153 Ga. App. 291, 294 (1980). “In construing an insurance policy, the test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean. The policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney.” *Cincinnati Ins. Co.*, 153 Ga. App. at 295 (citing *Nationwide*, 136 Ga. App. at 675).

4.

Here, the contract terms are clear: the insurance company may audit an insured for three years following a policy period and assess a final premium after the completion of the policy based upon the “actual premium basis.” The contract also provides that in the event “the final premium is more than the premium [the insured] paid to [the insurance company],” the insured would be required to pay the balance. During the 2006 policy period, Petitioner should have reported his three employees and the collective \$113,006 he paid in salaries. Premiums are based partially on the amount of payroll and, therefore, the premium he paid was inaccurate. The additional premiums he owes for the 2006 policy period amount to \$44,828.

No workers' compensation exception for kin

5.

Petitioner bases his argument that he should not be liable for the additional premiums primarily on the fact that he relied on erroneous information provided by a person in the insurance industry, who led him to believe that he did not need to provide coverage for kin. While Petitioner may have had a defense if the individual was an agent of AmTrust, he failed to prove by sufficient probative evidence the identity of such individual or his relationship, if any,

to AmTrust. Furthermore, Petitioner did not cite any Georgia law to support the proposition that employees are properly excluded from workers' compensation coverage because they are family members of the business proprietor. Rather, Georgia Code Section 34-9-2 enumerates exceptions to the application of workers' compensation laws (e.g., farm laborers and domestic servants). O.C.G.A. § 34-9-2(a)(2). "Family members of an employer" is not one such excluded category. Applying a basic principle of statutory construction—"expressum facit cessare tacitum, which means that if some things (of many) are expressly mentioned, the inference is stronger that those omitted are intended to be excluded than if none at all had been mentioned"—the Court concludes that the omission of an exception for kin "must be regarded as deliberate" on the part of the legislature. *C. Brown Trucking, Inc. v. Rushing*, 265 Ga. App. 676, 677 (Ga. Ct. App. 2004) (citing *Homebuilders Assn. of Ga. v. Morris*, 238 Ga. App. 194, 196-197 (1999)).

No recovery of premiums for 2009 policy year

6.

While AmTrust may recover the additional premiums for the 2006 policy year,⁶ it may not do so for any portion of the 2009 year for several reasons. First, an insurance company "has a duty to protect itself from additional damages or injury once [a] negligent misrepresentation was made and should have been discovered and to seek to limit further damages that proximately flow[] from such original wrongful acts." *United States Fid. & Guar. Co. v. Paul Assocs.*, 230 Ga. App. 243, 246-47 (1998) (affirmative defense). Here, AmTrust actually knew that Petitioner had employees he had not included on his application because he informed AmTrust's agent, Auditor Sonja Renfroe, of that fact during the initial audit in June/July of 2007. At that point,

⁶ The Court does not decide whether AmTrust could have collected premiums for the period prior to the completion of the first audit, May 23, 2007 through July 18, 2007, because AmTrust waived its rights to collect premiums during that period, and the issue was not appealed to this Court.

AmTrust could have prevented the underpayment of premiums in the subsequent policy years. The Court concludes that AmTrust cannot now rely on its failure to act.

7.

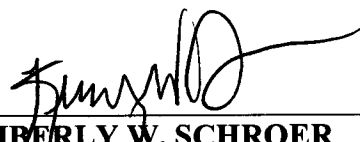
Second, Georgia has joined with the majority of jurisdictions that “place[] the burden upon the insurer to show that it acted in good faith . . . because the insurer is in possession of the documents relating to premium calculation and the settlement of claims, the burden should be placed upon the insurer to show that in setting the retrospective premiums, it complied with its duty to act reasonably and in good faith.” *Benton Express v. Royal Ins. Co. of Am.*, 217 Ga. App. 331, 333 (1995). Although this case does not involve retrospective premiums, Georgia courts later adopted this reasoning and applied it to “retroactive premium calculations,” at issue here, “because the insurer has the power to change significantly the premiums due after the expiration of the policy.” *Home Ins. Co. v. Sunrise Carpet Indus.*, 229 Ga. App. 268, 271-272 (1997). The key is the existence of a potential for a conflict of interest, *Id.*, as is seen clearly in this case. Had AmTrust informed Petitioner in July 2007, following its first audit, that he was required to include family employees under his workers’ compensation coverage, Petitioner could have mitigated the amount of additional premiums he owed for all subsequent policy periods, including 2009. Accordingly, the Court concludes that Amtrust has failed to prove that it is entitled to retroactively adjust and collect additional premiums from Petitioner for the short-term 2009 Policy.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the decision of the Workers’ Compensation Appeals Board is hereby **AFFIRMED IN PART and REVERSED IN PART**. Petitioner must pay AmTrust \$44,828 as an additional retroactive

premium for the 2006 policy year. Petitioner, however, is not obligated to pay an additional premium amount for the short-term 2009 policy year.

SO ORDERED, this 3rd day of September, 2014.



KIMBERLY W. SCHROER
Administrative Law Judge