

COMMONWEALTH OF PENNSYLVANIA

|                               |   |                            |
|-------------------------------|---|----------------------------|
| FLEMING, WYSE AND STILLEY     | : | BEFORE THE BOARD OF CLAIMS |
|                               | : |                            |
| VS.                           | : |                            |
|                               | : |                            |
| COMMONWEALTH OF PENNSYLVANIA, | : |                            |
| STATE WORKERS' INSURANCE FUND | : | DOCKET NO. 2087            |

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**FINDINGS OF FACT**

1. Fleming, Wyse and Stilley (hereinafter "FWS") is a Pennsylvania corporation, with offices at 2589 Washington Road. Pittsburgh, PA., ( Jt. Ex. 1.)

2. Defendant, Commonwealth of Pennsylvania, State Workers' Insurance Fund (hereinafter "SWIF") is an agency of the Commonwealth of Pennsylvania within the Pennsylvania, Department of Labor and Industry and is headquartered at 100 Lackawanna Avenue, Scranton, PA. (Jt. Ex. 1)

3. At all times material hereto FWS was a broker, licensed pursuant to the Pennsylvania Insurance laws. (Jt. Ex. 1)

4. Patrick J. Fleming, is President of FWS. (N.T. 140)

5. FWS is a Subchapter S Corporation having three shareholders, one of which is Patrick J. Fleming. FWS was formed prior to November 1993. (N.T. 152-162)

6. Years prior to the facts relevant to this case, Patrick J. Fleming, along with other interests, formed a corporation known as Nortrim Corporation. (N.T. 143-144, 152-154)

7. Acting on behalf of timberland owners, Nortim Corporation set up Workers' Compensation programs for independent logging contractors in various states including Pennsylvania. (N.T. 144-161)
8. The independent logging contractors paid a fee to Notrim Corporation for this service, part of which included premiums for Workers' Compensation Insurance. (N.T. 144-161)
9. In addition to providing Workers' Compensation Insurance, Notrim Corporation also provided "Risk Management". (N.T. 109-110)
10. "Risk Management" essentially is loss prevention and loss analysis services. (N.T. 156-157; Jt. Ex. 1, para. 17)
11. Prior to 1993 Notrim Plus Corporation (hereinafter "NPC") was formed. (N.T. 161)
12. Mr. Patrick Fleming was sole share holder of NPC. (N.T. 157-160)
13. NPC purchased the rights to service Notrim Corporation's customers located within the State of Pennsylvania. (N.T. 101-103; Jt. Ex. 1, para. 9)
14. Workers' Compensation Insurance was provided to NPC by SWIF for the period of November 25, 1993 to November 1, 1994 through Policy No. 03702996-93-1. (Jt. Ex.1, para. 10)
15. The estimated annual premium for the policy was Three Million Fifty-Seven Thousand Five Hundred and Eighty-Six Dollars (\$ 3,057,586.00). (Jt. Ex. 1, para. 11)

16. The estimated premium was calculated based on the payroll history of the customers of NPC. The payroll of an employer is the main factor in calculating Worker's Compensation Premium. (Jt. Ex. 1, para. 17; N.T. 241-243)

17. At all times relevant hereto, Mary T. Fox, was an Assistant Counsel to SWIF. (N.T. 124)

18. At all times relevant hereto, Thomas J. Finley was manager of SWIF's policy holder services. (N.T. 34, 133).

19. At all time relevant hereto, Mary McHugh was manager of SWIF's underwriting. (N.T. 89)

20. At all times relevant hereto, John P. O'Malley was SWIF's Director and Supervisor of both Mr. Finley and Ms. McHugh. (N.T. 101)

21. In November of 1993, SWIF orally contracted with FWS to provide Risk Management Services to SWIF on Policy No. 03702996-93-1 issued by SWIF to NPC. ( N. T. 129-138; Pltf. Ex. 1)

22. In December of 1994 SWIF executed a settlement agreement with FWS for payment of a fee due for services provided. (N.T. 129-138; Pltf. Ex. 15)

23. Compensation to SWIF for risk management services was agreed to be four percent (4%) of the insurance premium. (N.T. 162-165)

24. On September 27, 1995, Mary T. Fox, SWIF's counsel issued a memorandum to counsel for FWS. (N.T. 131-138; Pltf. Ex. 14)

25. The September 27, 1995 memorandum stated: (1) there is no formal written contract, that was offered in regard to this program. The fee was based on a verbal agreement between FWS and SWIF.... (2) this fee is paid on a percentage basis of the estimated annual premium and the final audited premium and is paid semi-annually. The first payment is made six (6) months into the policy term based on the estimated annual premium and the second payment is made after the final audited premium is determined. (3) the memorandum enclosed a copy of a Settlement Agreement providing for the first payment and the memorandum stated that the second payment could not be made until the final audited premiums had been calculated. (Pltf. Ex. 14)

26. Ms. Fox stated in the memorandum of September 27, 1995 that the substance of the memorandum had been reviewed with Mr. Finley prior to drafting the memorandum. (Pltf. Ex.14)

27. The insurance premiums for Workers' Compensation were calculated on actual labor costs. ( N.T. 241-243; Jt. Ex. 1)

28. Prior to drafting the memorandum of September 27, 1995, Ms. Fox, counsel for SWIF, conferred with Mr. Finley. (N.T. 131-138; Pltf. Ex.14)

29. The final audit for the Workers' Compensation Policy was issued on or about November 17, 1995. (Jt. Ex. 1)

30. The final audit establishes the annual premium for the policy based upon actual payroll costs. (Jt. Ex. 1)

31. The annual premium as established by the final audit totaled \$ 5, 651,718.00. (N.T. 185; Jt. Ex. 1)

32. Four percent (4%) of the annual premium is \$226,068.72. (Jt. Ex. 1.)
33. Pursuant to the settlement agreement of December 1994, SWIF paid FWS what was referred to as the first semi-annual premium of \$61,151.72. (N.T. 184-185; Jt. Ex. 1)
34. The difference between the premium previously paid to FWS and four percent (4%) of the annual audited premium is \$164,917.00. (N.T. 185-186)
35. The total premium paid by NPC to SWIF for this policy is \$3,449,765.76; four percent (4%) of total premium paid by NPC to SWIF is \$137,990.63. (Jt. Ex. 1)
36. The premium previously paid pursuant to the Settlement Agreement of December 1994 deducted from the \$137,990.63 is \$76,838.91. (Jt. Ex. 1)
37. Counsel for FWS demanded payment from SWIF in the amount of \$164,917.00 on December 20, 1995. (Jt. Ex. 1) On January 5, 1996, SWIF denied the claim. (Jt. Ex. 1)

## CONCLUSIONS OF LAW

1. This claim arises from an agreement with the Commonwealth and therefore the Board has jurisdiction pursuant to 72 P.S. §4651-1 et seq.
2. Although, the subject agreement between the parties is oral, neither party has denied the existence of the agreement.
3. The agreement generally provided for FWS to perform risk management services on behalf of SWIF, the underwriter of Workers' Compensation Contracts covering timbering activities of NPC.
4. The fee for the risk management services to be performed was four percent (4%) of the annual audited premium. The annual audited premium is also referred to as the earned premium.
5. Throughout the course of the contract FWS performed the risk management services to the apparent satisfaction of SWIF since no criticism or direction contrary to their activities was ever given to FWS by SWIF.
6. It was the responsibility of SWIF to collect the Workers' Compensation premium.
7. The total annual audited premium due SWIF from NPC on the policy was \$5,651,718.00. NPC paid only \$3,449,765.76 of the premium due.
8. Even though Patrick Fleming had varying degrees of equity ownership in NPC and FWS no creditable evidence was presented of improper or illegal action between NPC's failure to pay the complete premium due and FWS's claim to be paid a percentage of that unpaid premium.

9. SWIF through its authorized staff were aware of Mr. Fleming's interest in NPC and FWS prior to entering into the respective agreements.

10.. The majority of the terms of the agreement between FWS and SWIF were reduced to writing in the memorandum of September 27, 1995 issued by SWIF's counsel to counsel for FWS.

11. The terms of the agreement between SWIF and FWS as documented in this memorandum and as implemented by SWIF throughout the course of the agreement were established by SWIF's staff having the authority or the apparent authority to do so.

12. Audited premium is an amount clearly calculable by statutory regulation and industry standards and therefore, a certainty as required by contract law. Paid premiums conversely, is a figure which may vary with an unlimited number of factors not the least of which are one party's failure to pay and conversely the other party's failure to vigorously attempt to collect the debt.

13. FWS is entitled to \$164,917.00 representing the unpaid portion of four percent (4%) of the audited Workers' Compensation premium.

14. When a party has a right to payment under a contract and the payment is withheld and damages are liquidated and certain, interest is allowed at the legal rate.

15. The legal rate of interest is six percent (6%) per annum.

16. FWS is entitled to interest at the legal rate.

## OPINION

The hearing on this matter was held by a middle district panel of the Commonwealth of Pennsylvania, Board of Claims. The panel consisted of Richard B. Schwartz, Esquire, Attorney Member and Chairman, Howard G. Minckler, Engineer Member. The panel report has been submitted and reviewed.

The dispute centers around an oral agreement made between the Claimant and the Defendant. It was agreed between the parties that the Plaintiff would provide risk management services to the Defendant. The Defendant had underwritten the Workers' Compensation Insurance for various timbering operations in Pennsylvania. The Workers' Compensation Insurance was provided as part of a service to various timbering operations by NPC. The President and sole stock holder of FWS, Patrick J. Fleming, also owned a substantial equity interest in NPC. All authorized and appropriate staff of SWIF were aware of Mr. Fleming's role in the various corporations prior to entering into the oral agreement with FWS.

The Workers Compensation premium is established based on payroll cost consistent with industry standards, and estimated premium is initially charged the employer based on an estimate of the payroll cost for the insured undertaking. Subsequently, an audit is conducted of the insured undertaking and an audited or annual premium is established based on actual payroll cost as opposed to estimated payroll cost.

Both SWIF and NPC clearly understood this process for establishing premium. In November of 1994 subsequent to entering into the contract with NPC, SWIF through an oral agreement hired FWS to perform risk management services. The objective of this work is to proactively prevent losses for which SWIF would have to pay employee/claimants. FWS was to

be compensated for these services in the amount of 4% of the premium of the NPC Workers' Compensation policy.

The essence of the dispute is, 4% of which premium did the parties agree to. SWIF contends that it is 4% of the premium paid to SWIF by NPC. Plaintiff, FWS, contends that it is 4% of the premium owed to SWIF by NPC as confirmed by a final audit of the policy. It was SWIF's responsibility to collect premium from NPC. SWIF collected Three Million Four Hundred Forty-Nine Thousand Seven Hundred Sixty-Five Dollars and Seventy-Six Cents (\$3,449,765.76). However, the final audit indicated that the premium due SWIF was Five Million Six Hundred Fifty-One Thousand Seven Hundred Eighteen Dollars (\$5,651,718.00). SWIF contends FWS should only be paid 4% of the premium actually received by SWIF. FWS argues that its fee was 4% of the audited premium.

If the agreement was for the fee to be 4% of the premium paid as SWIF contends, clear and convincing evidence is necessary to establish this. The premium actually paid may vary tremendously. On the other hand the audited premium is a certain number which can be clearly established by a review of the record when the policy term is completed. Throughout the course of the contract SWIF did not object to, nor provide direction, to FWS's efforts to provide risk management services.

In post hearing submittals the Defendant has argued strongly of the alleged inequities of Patrick Fleming, having substantial if not exclusive equity interest in both NPC and FWS. SWIF contends that the NPC interest of Mr. Fleming did not pay SWIF all of the premiums due under its policy with SWIF. While the FWS interest of Mr. Fleming seeks to have SWIF pay to FWS 4% of what NPC did not pay SWIF. SWIF in some manner asserts this as a defense to the

Claim of FWS. For several reasons this defense fails.

First, SWIF with knowledge and understanding of Mr. Fleming's multiple rolls entered into an agreement with NPC to underwrite Workers' Compensation Insurance for timbering operations. This was an unremarkable agreement consistent with the business of both SWIF and NPC. Since logging operations can often be catastrophic and extremely costly SWIF with knowledge of Mr. Fleming's interest in FWS, hired FWS to perform risk management on the NPC policy. The objective of this work was to affirmatively prevent losses and analyze losses to prevent similar problems in the future. The appropriate staff of SWIF was well aware of Mr. Fleming's roles in the various corporations. However, the most significant reason why the defense fails is that no evidence of commingling, fraud, misrepresentation or non disclosure was presented at the hearing.

SWIF with knowledge and experience issued the NPC policy and then later entered into the FWS agreement. Unfortunately for SWIF events unfolded to its detriment. These events however, can not change the agreements SWIF made.



**ORDER**

**AND NOW** this 26th day of October, 1999, it is hereby **ORDERED** and **DECREED** that the Defendant, Commonwealth of Pennsylvania, State Workers' Insurance Fund, is indebted to the Plaintiff, Fleming, Wyse and Stilley in the amount of One Hundred Sixty-Four Thousand, Nine Hundred Seventeen Dollars(\$164,917.00) with interest at the legal rate of interest of 6% per annum from the date Plaintiff filed its Claim with the Board.

Each party to bear its own costs and attorneys fees. Upon receipt of said award, Plaintiff shall forthwith file with the Board of Claims a Praecipe requesting that this matter be closed, discontinued and ended with prejudice.

BOARD OF CLAIMS

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David C. Clipper  
Chief Administrative Judge

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Louis G. O'Brien, P.E.  
Engineer Member

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James W. Harris  
Citizen Member

Opinion Signed  
Oct. 26, 1999