

11-1750

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
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CATHY S. HATTON, CLERK
KANAWHA COUNTY CIRCUIT COURT

THE BUNCH COMPANY

Petitioners,

v.

Civil Action No. 10-AA-113
Judge Tod J. Kaufman

JANE CLINE, West Virginia Insurance Commissioner,
WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY
dba BRICKSTREET MUTUAL INSURANCE COMPANY,

Respondents.

FINAL ORDER

Before the Court is Petitioner's Petition for Appeal filed July 18, 2010, in which Petitioner appeals the Insurance Commissioner's Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant entered on July 9, 2010. On September 18, 2010, came the Respondents, the West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet") and Jane Cline, the West Virginia Insurance Commissioner ("WVIC"), as well as the Petitioners, Aero-Fab, Inc., ("Aero-Fab") and The Bunch Company ("Bunch"), for a conference requested by Petitioners to make a record regarding the basis of their complaint and the reason they should be entitled to conduct discovery and demand a jury trial on their administrative appeal of WVIC Case NO. 10-AP-FP-02027.

The Court then proceeded at the conference to hear the arguments of the parties on the fundamental question raised in the Motion to Dismiss, which is whether this Court may only revise, reverse or affirm the July 9, 2010, Order or remand the action to the Insurance Commissioner, or whether it may also grant the additional relief sought by Petitioners in this

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appeal. In deference to previous West Virginia Supreme Court of Appeals' ruling¹, this Court followed the guidance of said High Court ruling, by Order dated July 6, 2011, granted Respondent's Motion to Dismiss and dismissed Petitioner Aero-Fab and all claims *except* for the administrative appeal of the WVIC's Final Order. Further, by Order dated July 12, 2011, this Court denied Petitioner's Motion to Supplement the Record in light of the record provided.

On October 18, 2011, this Court held a hearing on the remaining issue in this case; the administrative appeal of the WVIC's Final Order. The Court has carefully considered the briefs, the record, and the final order of the WVIC. For the following reasons, the Court has concluded that the WVIC Order should be REVERSED.

FINDINGS OF FACT

Along with Aero-Fab, Bunch originally filed an Amended Class Action Complaint in the Circuit Court of Cabell County, West Virginia, alleging that the premium charged to the putative class representatives and others similarly situated for workers' compensation insurance included a charge for the expense of an agent commission, even though these insureds did not retain an agent when their coverage novated to Brickstreet on January 1, 2006.

1. STIPULATIONS

Bunch and BrickStreet jointly filed a Stipulation of Facts in the Cabell County action on April 30, 2008. The salient facts to which the parties agreed were as follows:

1. The exempt legislative rule is found at 85 C.S.R. 8-8 which states that in addition to a loss cost base rate, the premium rates charged by BrickStreet may also include: (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commission to agents and brokers, other policy acquisition or servicing

¹*State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 627 S.E.2d 365 (2008).

expenses, premium taxes, assessments and fees, reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the Mutual's surplus; and (3) all other rate making components consistent with industry practices. 85 C.S.R. 8-8.1.c. The rule further provides that "[a]ll such provisions must be subject to approval by the insurance commissioner."

2. The October 31, 2007, version of the Rule, specifically 8-11.2, provides that the base rates charged by the private carriers may also include: (1) a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commission to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices. The rule further provides that "[a]ll such provisions must be subject to the provisions of W. Va. Code § 33-20-4..."
3. Brickstreet became licensed with the West Virginia Office of Insurance Commissioner ("WVOIC") to transact the business of insurance in the State of West Virginia and began a collaborative effort to create a rate making system.
4. The National Council on Compensation Insurers ("NCCI") was designated by the WVOIC to be the rate making entity in West Virginia and specifically to set so-called "Loss Cost" rates for each of the 400+ classifications that were adopted in West Virginia. Loss Cost rates are simply one component of the rates necessary to cover the losses, medical and indemnity, for each classification.
5. BrickStreet also uses a Loss Cost Multiplier ("LCM") as another component of the premium rate to recoup the administrative expenses. Other components of the LCM allow BrickStreet to recover for such things as the costs associated with adjusting claims, defending its insureds in claim litigation, purchasing reinsurance, subscribing to NCCI, and achieving a reasonable profit.

6. On December 27, 2005, BrickStreet requested an LCM of 1.288, to be effective January 1, 2006. An agent commission was not included in the LCM calculation. The WVOIC approved an LCM of 1.105.
7. On April 7, 2006, BrickStreet requested an LCM of 1.254, to be effective July 1, 2006. An agent commission was included in the LCM calculation. The commission appears in the rate filing as an acquisition expense. In the July 1, 2006, rate filing, BrickStreet requested an acquisition expense of 3.0% of premium effective July 1, 2006, and an acquisition expense of 6.5% effective January 1, 2007. By letter of April 26, 2006, the OIC selected an acquisition expense of 1%. The OIC approved an LCM of 1.17. The same LCM must be applied to determine the premium rates for all insureds.
8. Not all BrickStreet insureds have an agent.

2. PROCEDURE

On November 3, 2008, the Circuit Court of Cabell County granted Plaintiffs' motion concluding that the filed rate doctrine has not been adopted in West Virginia and does not apply to this matter. As a result, the Court determined that BrickStreet unlawfully charged an agent commission to insureds without an agent, thereby entitling Plaintiffs to judgment as a matter of law.

Shortly thereafter, on December 10, 2008, the West Virginia Supreme Court of Appeals issued a decision in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 627 S.E.2d 365 (2008), which held that circuit courts cannot invade the jurisdiction of the Insurance Commissioner. Any challenge to an approved insurance rate by an aggrieved person or organization should be raised pursuant to W.Va. Code § 33-20-5(d) in a proceeding before the WVIC. Consequently, BrickStreet was granted relief pursuant to a Motion for Relief from Judgement from the previous Summary Judgment entry in favor of Plaintiffs.

Bunch then filed a Consumer Complaint with the WVIC on or about February 17, 2010, alleging that BrickStreet is charging it for an agent commission although Bunch does not have an agent, which is a violation of law. On July 9, 2010, the WVIC issued the Final Order Denying Hearing Request of Complainant in Insurance Commissioner Case No. 10-AP-FP-02027. The WVIC decided that a hearing would serve no useful purpose in this case based upon the lack of factual dispute and held that BrickStreet did not violate W.Va. Code § 23-2C-18(c) or W.Va. Code § 33-20-3(b) and that its rates were reasonable in relation to the benefits provided. Petitioner appeals this decision.

Standard of Review

This Court's review is governed by the West Virginia Administrative Procedures Act, W.Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W.Va. 1996).

CONCLUSIONS OF LAW

West Virginia Law authorizes the WVIC to “issue an exempt legislative rule to govern ratemaking and premium collection by [BrickStreet].” W.Va. Code § 23-2C-18(g) (2005); W.Va. Code § 23-1-1a(j)(3); W.Va. Code § 33-2-10(b); W.Va. Code § 33-2-21. The law governing Ratemaking authority was originally found at 85 C.S.R. 8-8 (2005-2007) and later moved to 85 C.S.R. 8-11 (2007 to present). The specific provision relating to charging an insured for an agent commission states:

In addition to said loss cost base rates, the premium rated charged by the Mutual may also include...a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commission to agents and brokers[...].

85 C.S.R. 8-8.1.c [2005]. The same provision was re-affirmed, in large part, when the Ratemaking rule was moved to a different section and reads as follows:

The base rates charged by the private carriers may also include...a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commission to agents and brokers[...].

85 C.S.R. 8-8.11.2 [2007]. West Virginia law permits BrickStreet to charge a premium for expenses incurred. However, it is contrary to West Virginia law to charge a premium for an expense never incurred. The WVIC erred as a matter of law by allowing BrickStreet to charge for an agent commission when no such expense was incurred. Thus, the WVIC failed to enforce its legislative rule.

West Virginia Law clearly permits BrickStreet to charge an appropriate premium for certain administrative expenses. However, the term “expenses” infers BrickStreet has actually

incurred the expense. BrickStreet charged and received payment for an agent commission from insureds that did not use an agent. BrickStreet stipulated to this fact that it charged some insureds for an expense (the agent commission) that it did not incur. By charging an insured an expense that was never incurred, BrickStreet has violated 85 C.S.R. 8-8.1.a-c [2007].

Furthermore, the WVIC's factual finding that "the rates charge by Brickstreet were reasonable in relation to the benefits provided due to the fact that certain administrative costs and/or expenses are incurred by Brickstreet in handling direct business which would otherwise be handled by appointed agents" is clearly wrong in light of the record. The record does not contain any mention of additional costs incurred by BrickStreet for "direct business." BrickStreet's request for a rate increase was for the added expense of agent commissions, not increased administrative costs and expenses. The argument that BrickStreet incurred the expense of an agent commission, in the form of increased internal expenses, is not supported by the record. There is simply no evidence in the record to support the finding that the increased costs of administering direct policies offsets the agent commission.

Respondents argue that this finding is supported by the Affidavit of Harry E. Mahler, Senior Vice President for Insurance Operations for BrickStreet, that was submitted with its Motion for Summary Judgment in the Cabell County Action. The affidavit states that the agent commission charged to insureds without an agent is "attributed to acquisition and servicing costs." At best, BrickStreet can argue that the affidavit could be considered by this Circuit Court by implication or some type/kind of judicial notice. But, even if some kind of judicial notice is imputed to form some factual basis it is not enough. Having never been litigated in this case, or being susceptible to cross-examination by the Petitioner makes it fatally defective if it were to be

allowed to slip into this case.

The WVIC was clearly wrong when it concluded that charging an agent commission to the Petitioner, even though it did not have an agent, was justified due to additional expenses incurred. The record on appeal simply does not support such a contention.

CONCLUSION

The statute under which the Petitioner has brought this appeal, W.Va. Code §33-2-14, provides “[t]hat the court or judge shall, without a jury, hear and determine the matter upon the record of proceedings before the commissioner, except that for good cause shown, the court may permit the introduction of additional evidence, and may enter an order revising or reversing the order of the commissioner, or may affirm such order or remand the action to the commissioner for further proceedings.” Therefore, it is hereby ORDERED that the Final Order denying hearing Request of Complainant in Insurance Commissioner Case No. 10-AP-FP-02027 is REVERSED and VACATED. The objections and exceptions of the Respondents are preserved and noted. The clerk of the court shall distribute copies of this Order to all counsel of record and this case is now DISMISSED from the docket of the Circuit Court.

Andrew R. Pauley, Esquire
State of West Virginia- Offices of the
Insurance Commissioner
1124 Smith Street
P.O. Box 50540
Charleston, WV 25303

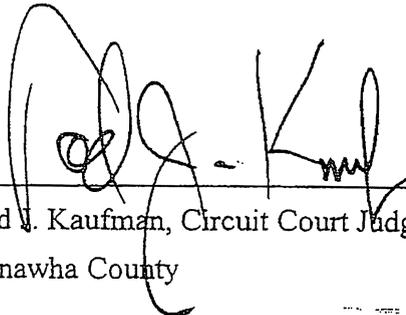
Paul T. Farrell, Jr., Esquire
Greene, Ketchum, Bailey, Walker,
Farrell & Tweel
419- 11th Street
Huntington, WV 25701

Alex J. Shook, Esquire
Hamstead, Williams & Shook
315 High Street
Morgantown, WV 26505

Jeffrey M. Wakefield, Esquire
Flaherty, Sensabaugh & Bonasso
200 Capitol Street
P.O. Box 3843
Charleston, WV 25338

Jane L. Cline, Insurance
Commissioner State of West
Virginia
Offices of the Insurance
Commissioner
Legal Services
P.O. Box 50540
Charleston, WV 25305

Enter this Order the 31ST day of October, 2011.



Tod V. Kaufman, Circuit Court Judge for
Kanawha County

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[Signature]
Deputy Circuit Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY A. BULLOCK, CLERK OF CIRCUIT COURT OF SAID COUNTY
ADHERE TO THE FOLLOWING: I HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
DATE: 11-2-11
[Signature]
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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2011 NOV 22 PM 1:54
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Civil Action No. 10-AA-113
Judge Tod J. Kaufman

JANE CLINE, West Virginia Insurance Commissioner,
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d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY,
Respondents.

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FINAL ORDER

Before the Court is Respondents' Motions for Reconsideration, Motion to Alter or Amend Judgment, and Motion for Relief from Final Order filed on November 14, 2011. The Petitioner has also filed a like Motion. The Court has carefully reviewed Respondents' Motions and Petitioner's Motion and hereby DENIES same. The Final Order is complete and ripe for appeal. Now this case is hereby DISMISSED from the docket of the Court. The clerk of the court shall distribute copies of this Order to all counsel of record:

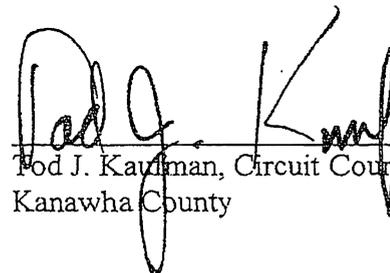
Andrew R. Pauley, Esquire
State of West Virginia- Offices of the
Insurance Commissioner
P.O. Box 50540
Charleston, WV 25303

Paul T. Farrell, Jr., Esquire
Greene, Ketchum, Bailey, Walker, Farrell &
Tweel
P.O. Box 2389
Huntington, WV 25724

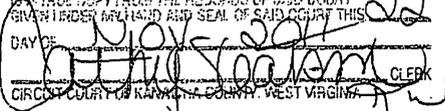
Erica M. Baumgras, Esquire
Jeffrey M. Wakefield, Esquire
Flaherty, Sensabaugh & Bonasso
P.O. Box 3843
Charleston, WV 25338

Alex J. Shook, Esquire
Hamstead, Williams & Shook
315 High Street
Morgantown, WV 26505

Enter this Order the 22 day of November, 2011.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF NOVEMBER 2011.


CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA