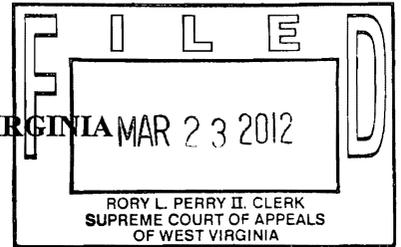


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 11-1750



**West Virginia Employers' Mutual
Insurance Company, d/b/a
BrickStreet Mutual Insurance
Company, and Jane Cline, West
Virginia Insurance Commissioner,
Respondents Below, Petitioners**

v.)

**The Bunch Company, Petitioner
Below, Respondent**

Appeal from a Final Order
of the Circuit Court of Kanawha County
(Civil Action 10-AA-113)

Petitioner's Brief

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ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT OF KANAWHA COUNTY ERRED WHEN IT MADE INCORRECT AND ERRONEOUS FINDINGS OF FACTS DESPITE CLEAR AND PLAIN EVIDENCE TO THE CONTRARY WHICH IS AN ABUSE OF DISCRETION.
- II. THE CIRCUIT COURT OF KANAWHA COUNTY REVERSED AND VACATED THE JULY 9, 2010 ORDER OF THE INSURANCE COMMISSIONER WHICH AMOUNTS TO A RE-EXAMINATION OF THE RATES PREVIOUSLY APPROVED BY THE COMMISSIONER AND RUNS DIRECTLY CONTRARY TO *STATE EX REL. CITIFINANCIAL, INC. V. MADDEN*, 223 W.VA. 229, 672 S.E.2D 365 (2008) AND IS AN ABUSE OF DISCRETION.
- III. THE CIRCUIT COURT OF KANAWHA COUNTY WHILE VACATING THE ORDER OF THE INSURANCE COMMISSIONER DID NOT PROVIDE ADDITIONAL DIRECTION CONCERNING THE REGULATORY DISCRETION OF THE INSURANCE COMMISSIONER AND BY NOT DEFERRING TO THE ADMINISTRATIVE HANDLING OF THE CONSUMER COMPLAINT ERRONEOUSLY AND PLAINLY ERRED AND IS AN ABUSE OF DISCRETION.

STATEMENT OF THE CASE

The Bunch Company (hereinafter “Bunch”) filed a Class Action Complaint in the Circuit Court of Cabell County, West Virginia, Civil Action No. 07-C-0852, alleging that the premium charged to it and others 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 West Virginia Employers’ Mutual Insurance Company, d/b/a BrickStreet Mutual Insurance Company (hereinafter “BrickStreet”) on January 1, 2006. BrickStreet denied that it charged any insured an expense for an agent commission and asserted that the rates it utilized were established by the West Virginia Insurance Commissioner (hereinafter “Commissioner” or “Insurance Commissioner” or “WVIC” or “WVOIC”)¹, that the claims are barred by the filed

¹ Jane L. Cline, Insurance Commissioner was properly named in the Circuit Court of Kanawha County appeal as she was the existing Insurance Commissioner at that time. Subsequent to the filing of pleadings

rate doctrine, and that the exclusive remedy lies with the Insurance Commissioner. Bunch and BrickStreet jointly submitted a Stipulation of Facts in the Cabell County action and subsequently filed summary judgment motions. (A. R. 1-5). BrickStreet submitted with its motion the Affidavit of Harry E. Mahler in support of the contention that the lost cost multiplier (“LCM”) approved by the Insurance Commissioner assumed that some policies would not be written through an agent and would not have a commission expense, and that for policies written through an agent, the portion of the premium attributable to commissions is not retained by BrickStreet, while for policies written direct, that portion of the premium collected is attributed to acquisition and servicing costs, as the acquisition load was intended to offset the increased expenses of BrickStreet in administering direct policies through the performance of a number of services. The Circuit Court entered an Order on November 3, 2008, granting Bunch's motion and denying BrickStreet's motion, concluding that the filed rate doctrine has not been adopted in West Virginia and does not apply to this matter and that BrickStreet unlawfully charged an agent commission to insureds without an agent. (A. R. 1-15). In light of the decision in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 627 S.E.2d 365 (2008), BrickStreet sought relief from the November 3, 2008 Order pursuant to Rule 60(b). The Circuit Court of Cabell County granted the motion for relief from judgment by Order of February 27, 2009, setting aside its November 3, 2008 Order and granting summary judgment in favor of BrickStreet. (A. R. 17-25). Bunch filed a Petition for Appeal with the Supreme Court, which was refused by Order of October 29, 2009.

Bunch then filed a Consumer Administrative Complaint with the West Virginia Insurance Commissioner on February 17, 2010, alleging that BrickStreet is charging for an agent

in this matter, Ms. Cline retired from the Insurance Commissioner's Office and Michael D. Riley has been named Insurance Commissioner for the State of West Virginia as of July 1, 2011.

commission although Bunch does not have an agent, which is a violation of law, and attached the Amended Class Action Complaint in the Cabell County action. (A. R. 27). BrickStreet answered the Consumer Complaint and attached its Answer in the Cabell County action, as well as the Stipulation of Facts and the Mahler Affidavit filed with its Motion for Summary Judgment in that action. (A. R. 39). On July 9, 2010, the Commissioner issued the Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant in 10-AP-FP-02027. (A. R. 77). Among its findings of fact and conclusions of law were the referenced rate filings that BrickStreet had made in regards to this matter. (A. R. 83-84). In its appeal of this Order, Bunch asserted that the Commissioner erred as a matter of law by refusing a hearing and by concluding that the rate filings by BrickStreet did not comply with West Virginia law. Bunch also asserted that the Commissioner was clearly wrong in concluding that the rates charged by BrickStreet were reasonable in relation to the benefits provided, and that the Commissioner acted in an arbitrary and capricious manner by refusing to consider the Petitioner's claim of false advertising. (A. R. 225). The Commissioner filed a Designation of the Record on August 6, 2011 (A. R. 151) and its brief on September 7, 2011. (A. R. 263). BrickStreet also filed its brief on September 7, 2011. (A. R. 237). The Circuit Court heard oral argument on October 18, 2011. (A. R. 303). By Order of October 31, 2011 (A. R. 351), the Circuit Court concluded that the Insurance Commissioner erred by allowing BrickStreet to charge for an agent commission when no such expense was incurred; that the finding by the Insurance Commissioner that the rates charged by BrickStreet were reasonable in relation to the benefits provided due to the fact that certain administrative costs 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, which does not contain any mention of additional costs incurred by BrickStreet for direct

business; and that BrickStreet cannot rely on the Affidavit of Harry E. Mahler because it has not been litigated in this case and was not susceptible to cross-examination by Bunch. The Circuit Court of Kanawha County further reversed and vacated the July 9, 2010 Order of the Insurance Commissioner. (A. R. 351-59). The Commissioner and BrickStreet filed motions to alter or amend the judgment under Rule 59(e) which were denied by Order of November 22, 2011. (A. R. 369-392.) It is from the October 31, 2011 and November 22, 2011 orders that the West Virginia Insurance Commissioner now appeals.

SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County failed to recognize and defer to the regulatory authority and subsequent decision making of the West Virginia Insurance Commissioner when it vacated the Order entered by the Insurance Commissioner denying an administrative hearing request of Bunch who was seeking to have a rate approval declared illegal. The Insurance Commissioner after reviewing the matter found that there was essentially no dispute of factual issues to be heard, that the matters had been exhaustively litigated in the Circuit Court of Cabell County and that the rates had been filed in an open and transparent process years before this administrative matter was filed with the Insurance Commissioner.

Further, the Circuit Court of Kanawha County failed to follow existing precedent and substituted its judgment and the judgment of Bunch instead of deferring to the West Virginia Insurance Commissioner who has unique and exclusive original jurisdiction to determine such matters under the West Virginia statutory scheme and as directed by this Court.

Finally, the Circuit Court of Kanawha County did not provide any direction from its vacation of the Commissioner's Order. This leaves the parties in a quandary as to how to proceed concerning the parameters and scope of the Commissioner's authority to approve rates

in their due course and administer requests for administrative proceedings presented to the state agency. With all due respect to the parties, neither the Insurance Commissioner nor any agency should have to hold administrative hearings to explain or academically discuss base rate plan approvals or its internal processes. It is neither a good use of quasi-judicial economy nor the best use of resources for the State of West Virginia. The Insurance Commissioner has a means via procedural rules and statutes to handle administrative proceedings which should have been deferred to in this instance as they were followed by the Insurance Commissioner. Failure to acknowledge the procedural and statutory provisions available and used by the Insurance Commissioner was an abuse of discretion by the Circuit Court of Kanawha County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided in the Court's recent decision in *State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008) and the lack of a general factual dispute concerning this matter, oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision. However, the Insurance Commissioner will defer to the Court and other parties if they believe a Rule 20 argument is more appropriate.

ARGUMENT

I. THE CIRCUIT COURT OF KANAWHA COUNTY ERRED WHEN IT MADE INCORRECT AND ERRONEOUS FINDINGS OF FACTS DESPITE CLEAR AND PLAIN EVIDENCE TO THE CONTRARY WHICH IS AN ABUSE OF DISCRETION.

The standard of review in regards to this matter has been stated by this Court as the following, "The case before us is an appeal of an administrative order... that review is controlled

by the provisions of W.Va. Code, § 29A-5-4(g) (1964), as follows: 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.

On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4(a) (1964) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Philyaw v. Gatson*, 195 W.Va. 474, 466 S.E.2d 133 (1995), and W.Va. Code § 29A-5-4(g) (1964). In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." *Muscatell v. Cline*, 196 W. Va. 588, 594-5, 474 S.E.2d 518, 524-5 (1996).

The Insurance Commissioner after the filing of the administrative complaint undertook a review of its prior actions and determined that a hearing would serve no useful purpose. The administrative complaint stated that “BrickStreet is charging The Bunch Company for an agent commission. The Bunch Company does not have an agent. This is a clear violation of law. Amended Complaint attached hereto.” (A. R. 27).

Consequently, there was no factual disagreement regarding this matter only a misunderstanding of the rate filing and approval process by the Insurance Commissioner. As previously cited, the parties had stipulated to facts in their underlying litigation in the Circuit Court of Cabell County. (A. R. 1). The parties essentially agreed that the rate was charged and that an agent did not procure the coverage but in fact it was direct write business from the company. (A. R. 1-4). Further, the Insurance Commissioner supplemented the record at the Circuit Court administrative appellate level with nearly 2000 pages of documentation mainly including the rate filings of Petitioner, BrickStreet. (A. R. 151).

The Honorable F. Jane Husted, Circuit Judge of the Circuit Court of Cabell County, found in her Order Granting Motion for Relief from Judgment of February 27, 2009 vacating the previous Order of Judge Cummings in the underlying litigation, “The *CitiFinancial*² case is directly on point for BrickStreet and could not be any clearer in its holding that courts cannot become involved in issues concerning insurance rates that have been filed with and approved by the Insurance Commissioner. Although the Supreme Court does not specifically address the filed rate doctrine in the *CitiFinancial* case, that is just a term of art, and the holding in that case embodies the fundamental principles of the doctrine based on the language and intent of W.Va. Code §33-6-30(c) (2002). The plaintiffs are challenging a “rate” in the present case, as the

² The Court’s reference is to *State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008)

administrative expense for agent commissions is a component of the Workers' Compensation premium rate that has been filed with and approved by the Insurance Commissioner." (A. R. at 23). The Circuit Court of Cabell County, Judge Hustead clearly stated the issue.

In its Final Order, the Circuit Court of Kanawha County stated that "West Virginia law permits Brick[S]treet 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 Brick[S]treet to charge for an agent commission when no such expense was incurred. Thus, the WVIC failed to enforce its legislative rule." (A. R. 356). However, the Court does not cite any specific support or justification for this conclusion of law. The Order is incorrect as a matter of law and factually. The voluminous record showed as pointed out in the administrative appeal hearing in this matter, that BrickStreet was in fact incurring a similar expense if it was paying an agent commission load or incurring internal operating expenses in direct write business obtained. (A. R. 346). This information was contained throughout the record and the underlying litigation despite the Bunch Company stating it did not exist. (A. R. 346). Failing to understand that a base rate is a prospective factor that is applied to each potential premium rate prospectively is a crucial point that has been missed in regards to this matter. BrickStreet requested the right from the Insurance Commissioner to charge a particular rate and then applies it to each of its prospective customers. All ratemaking is somewhat prospective (especially in the infancy of the privatization of a monopolistic system) and has a minor degree of uncertainty in it. That is why after there is some loss experience with a particular rate; additional rate filings must show loss cost modifier modifications and loss ratios to ascertain the correctness of the particular rate at any given time. It must be regulated by an agency who understands the market and rate filings in general. Substitution of personal

judgment can destabilize a market and cause critical issues to an insurance company doing business where the personal judgment doesn't have the requisite understanding of the industry practices in regards to this matter. Simply because agent commissions were not incurred because the person didn't use an agent, does not negate the fact that the company had to direct write the business and incur like expenses and acquisition costs that the agent would have absorbed in their handling of the procurement. This information was provided to WVOIC by BrickStreet. (A.R. 85).

The Circuit Court of Kanawha County fails to defer to the expertise of the Insurance Commissioner and fails to discuss pointed areas of the record which discussed these issues. (A. R. 152, 277 and 346). Failure to acknowledge the voluminous filings that the Commissioner supplemented the record with as well as the many hours of work product by the Commissioner in reviewing these filings and approving the same as well as pointed examples contained therein was an abuse of discretion and made any finding plainly and clearly erroneous. While the Circuit Court of Kanawha County and Bunch seize upon the Harry Mahler affidavit, they overlook the vast majority of the record which points to the slow and deliberative process the West Virginia Insurance Commissioner undertook to regulate this new entity that was privatized from a monopolistic system. Bunch even agrees that matter doesn't turn on the Mahler affidavit. (A. R. 346). The findings of fact and conclusions of law by the Circuit Court of Kanawha County was an abuse of discretion and clearly erroneous because of the failure to review and decide upon the entire record and because those findings were incorrect as evidenced by the record.

II. THE CIRCUIT COURT OF KANAWHA COUNTY REVERSED AND VACATED THE JULY 9, 2010 ORDER OF THE INSURANCE COMMISSIONER WHICH AMOUNTS TO A RE-EXAMINATION OF THE RATES PREVIOUSLY APPROVED BY THE COMMISSIONER AND RUNS DIRECTLY CONTRARY TO *STATE EX REL.*

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AND IS AN ABUSE OF DISCRETION.**

The expertise of approving the insurance rates is within the purview of the Insurance Commissioner. The Insurance Commissioner had reviewed and approved the rate filings in an open and transparent manner. Consequently, it is problematic that a couple of years after the fact, the Circuit Judge of Cabell County, initially, and later the Circuit Court of Kanawha County substituted their judgment and the judgment of the Bunch Company for that of the state administrative agency charged with handling this approval. This Supreme Court of Appeals determined in *State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008) that “the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner.” *Id.* at 238, 374. Further, the Court stated, “It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to the permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner’s expertise and jurisdiction.” *Id.* at 237, 373. The Court additionally discussed, “A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this matter then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.” *Id.*

Therefore, the West Virginia Supreme Court of Appeals has in fact posited this authority with the Insurance Commissioner as has the West Virginia Legislature. The Commissioner has time and time again fulfilled his duties within the parameters of the referenced code sections and his Findings and Order are consistent with the ruling referenced in *CitiFinancial v. Madden*. Id.

In regards to this matter, the Commissioner received the administrative complaint. He reviewed the rate filings and determined they were in order and proper. The administrative complaint of Bunch did not assert a factual disparity and was seeking to overturn an illegal rate in their estimation that had been approved. The Circuit Court of Kanawha County found the Commissioner was clearly wrong in the findings leading to the denial of hearing. (A. R. 351). However, it is not clear what it was based upon.

The Commissioner must approve rates that are not excessive, unfairly discriminatory but they must also be adequate. [Emphasis added.] W.Va. Code §23-2C-18 (2007). This is an important concept because the Petitioner, BrickStreet was a new company formed from an executive and legislatively devised plan to privatize the workers' compensation insurance market. The authority posited with WVOIC was based upon Legislative findings contained in W.Va. Code §23-1-1(a) (2007) that "a deficit exists in the Workers' Compensation Fund of such critical proportions that it constitutes an imminent threat to the immediate and long-term solvency of the fund and constitutes a substantial deterrent to the economic development of the State." Further, the Legislature found that "[m]odification to the rate system, alteration of the benefit structure, improvement of current management practices and changes in perception must be merged into a unified effort to make the workers' compensation system viable and solvent through mutualization of the system and the opening of the market to private workers' compensation insurance carriers." W.Va. Code §23-1-1 (a) (2007). "It is the intent of the

Legislature, expressed through its enactment of legislation, to transfer regulation of the workers' compensation system to the Insurance Commissioner." W.Va. Code §23-1-1 (e) (2007).

Additionally, in developing the transitory language between the Workers' Compensation Commission and the Insurance Commissioner, the West Virginia Legislature adopted the following language, "In the event of any conflict, the provisions of this article shall have paramount effect, but the provisions in this chapter and chapter thirty-three [§§33-1-1 *et seq.*] of this code shall be construed as complementary and harmonious unless so clearly in conflict that they cannot reasonably be reconciled." W.Va. Code §23-2C-18 (2007). Consequently, language contained in Chapter 33 is expressly relevant to workers' compensation insurance rates. As such, the West Virginia Legislature prior to the enactment of workers' compensation transitory language had enacted W.Va. Code §33-6-30 (2002) which sections that are relevant to this inquiry include the following: "(b) The Legislature finds: (1) That consumers and insurers both benefit from the legislative mandate that the Insurance Commissioner approve the forms used and the rates charged by insurance companies in this state;...(4) That the provisions of this chapter were enacted with the intent of requiring the filing of all rates and forms with the Insurance Commissioner to enable the Insurance Commissioner to review and regulate rates and forms in a fair and consistent manner;...(5) That the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium refunds or partial premium refunds when the form used and the rates charged by the insurance company have been approved by the Insurance Commissioner;...(6) That actions seeking premium refunds or partial premium refunds have a severe and negative impact upon insurers operating in this state by imposing unexpected liabilities when insurers have relied upon the Insurance Commissioner's approval of the forms used and the rates charged insureds; and (7) That it is in

the best interest of the citizens of this state to ensure a stable insurance market....(c)....Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter.” W.Va. Code §33-6-30 (2002). The Circuit Court of Kanawha County did not make any findings concerning this rebuttable presumption.

The Insurance Commissioner was given latitude in the approval of rates and implementing the transitional market. “There is a substantial public interest in creating a method to provide a stable workers’ compensation insurance market in this State.” W.Va. Code §23-2C-1(a)(8) (2005). “A stable, financially viable insurer in the private sector will aid in providing a continuing source of insurance funds to compensate injured workers.” W.Va. Code §23-2C-1(a)(11) (2005). The Commissioner was charged with intense monitoring of the economic viability of the early BrickStreet creation. W.Va. Code §23-2C-3(b)(2) (2009). The Commissioner had broad discretion to waive other requirements imposed upon mutual insurance companies to enable the company to begin insuring employers in this state “at the earliest possible date.” W.Va. Code §23-2C-3(b)(3) (2009). The commercial rates were required to be filed with the Insurance Commissioner and if not disapproved within initial 30 day window, will become effective upon first usage after the filing. W.Va. Code §33-20-4(h) (2005).

Consequently, the Insurance Commissioner was statutorily charged with monitoring the economic viability of the fledging company and making sure that its rates were viable and actuarially sound to support the claims being submitted to the company. Were the Commissioner to not perform her duties, issues concerning the company could be dramatic.

Understatement of expenses can cause an overstatement of surplus which can become a

solvency problem for insurers. “Rates are inadequate if they are clearly insufficient, together with the income from investments attributable to them, to sustain projected losses and expenses in the class of business to which they apply.” W.Va. Code §23-2C-18(e) (2007). The Commissioner reviewed this information, reviewed the rate filings, discussed the rate filings with the company, reviewed its financial statements and generally regulated the entity that is known as BrickStreet. With accountants, attorneys, actuaries, staff, other knowledgeable insurance professionals and the expertise from vast resources including the National Association of Insurance Commissioners (NAIC) and the National Council for Compensation Insurance, Inc. (NCCI), the Insurance Commissioner undertook her responsibilities and regulated the company. Bunch, however, now wishes to come forward and unwind the great volume of work and expertise and to have this Court substitute their judgment for that of the Insurance Commissioner. That substitution of authority is in violation of the referenced statutes, the Legislative intent of the codifications referenced, the opening of the workers’ compensation market in West Virginia and the express holding of *CitiFinancial v. Madden. State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

The administrative rules that have been referenced in this litigation and appeal, namely W.Va. Code of State Rules §85-8-8³ contains a provision which allows for reasonable expenses to be contained in the rate. (A. R. 3). Both versions of the administrative rule allow for charges for “a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, **such as commissions to agents and brokers, other policy acquisition or servicing expense....**” [emphasis added]. W.Va. Code R. §85-8-11.2 (2008), as amended. The totality of the rate structure request is taken into account before a loss cost

³ Subsequent amendments to this rule section now have this provision as W.Va. Code R. §85-8-11.2 (2008).

modifier is approved. Rates are prospective costs, expenses and projected amounts need to be charged so that there will be enough reserve to fund claims and loss adjustment expenses. The Circuit Court of Kanawha County and Bunch by not recognizing the same were clearly wrong and abused its discretion by failing to give deference and follow clear statutory and rule guidance in regards to these matters. It cannot be said that the Commissioner 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 expense incurred.” (A. R. 358). This was not ever shown by Bunch or the Circuit Court of Kanawha County to be “clearly wrong” nor could it have been in regards to this matter because of the existing base rate structure for such entity. The Circuit Court of Kanawha County or Bunch did not provide any legal support for its argument nor provide a justification for the overwhelming evidence of insurance related filings contained in the record itself which appears to be an arbitrary and capricious abuse of discretion.

Finally, the workers’ compensation class advisory loss costs are actuarially determined by the National Council on Compensation Insurance, Inc. (NCCI), West Virginia’s statistical rating agent. W.Va. Code §23-2C-18a (2007). Advisory loss costs do not include a carrier’s Loss Cost Multiplier, which is a factor that increases the loss costs to recover administrative expenses and business operations. The final rate will be the class advisory loss costs multiplied by the carrier loss cost multiplier.⁴ The final rate is used to develop the ultimate and final premium for each policyholder in a particular year based upon underwriting criteria. In the rate filings themselves, substantial discussion was had with the Commissioner and BrickStreet concerning the Loss Cost Multiplier (“LCM”) and it was even conceded and stipulated that

⁴ Payroll fluctuations and allocations, classification assignments, experience rating modifications, credit/debit programs and additional policy endorsements will all contribute to the final written premium due for each policy. These factors, as well as all surcharges, are not reflected in the loss cost amounts.

BrickStreet had asked for a larger LCM than what was actually approved by the Commissioner. (A. R. 4-5). This variance was due in part to the acknowledgment by the Insurance Commissioner that in some instances an administrative fee was being charged in lieu of an agent commission on direct written business. The final approval of an LCM by the Commissioner took into account all of these factors which were required to be considered before any rate can be approved. The Commissioner was active in each of the rate approvals relevant to this appeal and included that documentation in the record. (A. R. 83-84, 152, 277 & 346.)⁵

Therefore, failure of the Circuit Court to defer to the administrative agency in this instance was an abuse of discretion.

III. THE CIRCUIT COURT OF KANAWHA COUNTY WHILE VACATING THE ORDER OF THE INSURANCE COMMISSIONER DID NOT PROVIDE ADDITIONAL DIRECTION CONCERNING THE REGULATORY DISCRETION OF THE INSURANCE COMMISSIONER AND BY NOT DEFERRING TO THE ADMINISTRATIVE HANDLING OF THE CONSUMER COMPLAINT ERRONEOUSLY AND PLAINLY ERRED AND IS AN ABUSE OF DISCRETION.

The Circuit Court of Kanawha County found that the Final Order denying hearing request of Complainant in Insurance Commissioner Case No. 10-AP-FP-02027 was reversed and vacated. (A. R. 351). There was no direction concerning the matter and it appears the Circuit Court made a decision on a single point of law concerning the determination by the Commissioner that the rate charged was illegal. Despite providing no further legal justification for the Order and apparently in contravention of *State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008), the Insurance Commissioner is without understanding and clarity of how to proceed in regards to this matter. This would also apparently be an abuse of discretion under the finding of the Commissioner being “clearly wrong”. “In this case, when the

⁵ To reduce the volume of the Appendix Record, the actual filings were not included but can be supplemented upon request by this Court.

circuit court substituted its judgment on the evidence in conflict for that of the agency without either taking additional evidence or remanding the matter to the Commissioner for further consideration, including the possible taking of additional evidence, the court below did not meet the clearly wrong standard for review of the agency decision and abused its discretion.” *Muscatell v. Cline*, 196 W. Va. 588, 598, 474 S.E.2d 518, 528 (1996).

If the ruling of the Court is that the Commissioner must hold an administrative hearing, it did not make findings of fact or conclusions of law concerning that matter nor did it opine upon W.Va. Code §33-2-14 (1957) or W.Va. Code of State Rules §114-13-3.3 (2003). The provisions of the West Virginia Code specifically allow an appeal from an Order of the Commissioner refusing a hearing. W.Va. Code §33-2-14 (1957). Further, the Commissioner has a procedural rule which allows it to deny a hearing where there would be no useful purpose. W.Va. Code St. R. §114-13-3.3 (2003). The Insurance Commissioner is concerned where deference is not given to his regulatory authority, what parameters and scope must be followed in these matters. While it has been shown that the Insurance Commissioner has statutory and rule authority for denying hearings where no useful purpose would be served, if the ruling in this matter is that those provisions are inapplicable to this matter then it is extremely problematic. In a matter such as this where potentially thousands of policyholders are affected, should the Insurance Commissioner hold an administrative hearing for each case? It is neither economically feasible nor possible for the Insurance Commissioner to perform the tasks required of him if that is in fact the inferred holding from this matter. Further, such matters could tie the hands of the Insurance Commissioner for years preventing him from doing that which he is statutorily bound to execute. Additionally, such inference from the ruling would result most likely in inconsistent results. Further, if just the two litigants in the contested case are allowed to determine the outcome for

those particular policyholders, what of the entire policyholder pool? The Insurance Commissioner undertakes his regulatory responsibilities by making sure there is consistency throughout the entire policyholder pool and not just a few litigants. There is a continuing duty of the Insurance Commissioner to review rates if there are additional issues with the same. W.Va. Code §33-20-5(c) (1967). Cited in *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 236, 672 S.E.2d 365, 372 (2008).

It is the clear contention of the WVOIC that it vigorously and legally handled this administrative complaint within the confines of legal authority and invoked known and clear statutory guidelines in the resolution of this matter.

The relevant code sections concerning disapproval of rates are contained in W.Va. Code § 33-20-5 (1967) which reads as follows:

§33-20-5. Disapproval of filings.

(c) If at any time subsequent to the applicable review period provided for in subsection (a) or (b) of this section, the commissioner finds that a filing does not meet the requirements of this article, he shall, after notice and hearing to every insurer and rating organization which made such filing, issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(d) Any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon. If, after such hearing, the commissioner finds that the filing does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

Consequently, there is a precursor section involving the Commissioner's authority before the analysis begins in W.Va. Code §33-2-5(d) (1967). The Insurance Commissioner has several duties. In some cases where he does not have an immediate direct interest (e.g. claim handling in a two vehicular accident), he may grant or deny hearings on matters in contested cases and act as a quasi-judicial tribunal. In other matters, he is the direct prosecutor of potential civil violations of code among many of his responsibilities especially concerning, market conduct, licensure of producers and/or insurance companies. *See* W.Va. Code §33-2-9 (2006), §33-12-1 (2002), *et seq.* and W.Va. Code §33-3-11 (1973), respectively.

It is the position of the Insurance Commissioner that once a matter has been thoroughly investigated or examined by his Offices, a W.Va. Code §33-2-5(d) (1967) hearing generally may not serve a useful purpose as he may take direct action against the entity on his own accord or deny the same as having no merit within the parameters of his authority especially upon a proprietary function of his Office of which he is specifically charged to execute. The Insurance Commissioner readily admits that deviations from filings may result in factual disputes from which an administrative hearing may be necessary but that is not involved in the instant administrative complaint and appeal.

Holding administrative hearings for the education of the public in the handling of the Insurance Commissioner's affairs or any state agency for that matter is not a best use of public funds, agency time or general use of access to courts (even if quasi-judicial) in general. The public as well as attorneys can make Freedom of Information Act requests. W.Va. Code §29B-1-1, *et seq.* (1977).

Further, Circuit Courts are granted with the authority to dispose of litigation before them when certain criteria has not been met. *See e.g.* W.V.R.C.P., Rules 12 and 56.

Therefore, there are procedural and substantive ramifications from the Circuit Court's Order that need clarification before the Insurance Commissioner can proceed with handling of administrative matters such as these. The failure of the Circuit Court to discuss any of the ramifications or issues causes a void in this matter that should be resolved by this Court but nevertheless was an abuse of discretion.

CONCLUSION

The Circuit Court's Final Order of October 31, 2011 should be reversed and vacated in its entirety and the Order of the Insurance Commissioner entered on July 9th, 2010 (A.R. 77), should be reinstated and upheld. Further, the West Virginia Insurance Commissioner would seek any and all further relief that the Court deems just and appropriate.

RESPECTFULLY SUBMITTED,

Signed: _____



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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2012, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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