

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania,
Plaintiff

v.

Reliance Insurance Company,
Defendant

: No. 269 M.D. 2001
:

2008 APR 22 A 10:12
RECEIVED
CLERK OF COURT

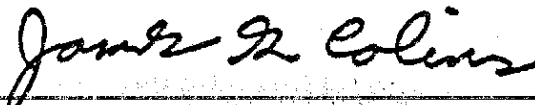
IN RE: Order Approving Referee Bailey's Decision in the matter of
Genesis Consolidated Services, POC Nos. 2158965 and 2158966

ORDER

AND NOW, this 22nd day of April 2008, the Court has given consideration to the decision of Referee Bailey assigning the claims herein to priority level (e) as claims for unearned premium or other premium refunds. See 40 P.S. §221.44(e). The Court notes that no objection to the recommended decision has been received, accordingly, the Court does CONFIRM and ACCEPT the decision of Referee Bailey attached hereto and marked as "Referee Decision Exhibit A."

A copy of this Order shall be served by the Liquidator upon all listed on the Master Service List. Thereafter, an affidavit of service shall be filed with the Court.

By the Court:



JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania,
Plaintiff

No: 269 M.D. 2001

V.

Reliance Insurance Company,
Defendant

POC No. 2158965 & 2158966

**IN THE MATTER OF OBJECTIONS TO NOTICE OF DETERMINATION BY
GENESIS CONSOLIDATED SERVICES
FOR PROOF OF CLAIM NUMBERS 2158965 AND 2158966
REFEREE FINDINGS AND RECOMMENDATIONS**

G. Alan Bailey, Esquire, duly appointed Referee in the Matter of Objection to Notice of Determination by Genesis Consolidated Services for Proof of Claim Numbers 2158965 and 2158966 hereby recommends to the Honorable Judges of the Commonwealth Court of Pennsylvania that the Liquidator's Notice of Determination be approved and in support thereof presents the following:

BACKGROUND

1. By Order of the Commonwealth Court of Pennsylvania ("Court") dated October 3, 2001 ("Liquidation Order"), Reliance Insurance Company ("Reliance") was found to be insolvent and placed into liquidation. M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania ("Liquidator") was appointed Liquidator of Reliance.¹
2. By Order of the Court dated September 9, 2002 ("Claims Filing Order") the Honorable James Gardner Colins, established claims filing procedures, claims' filing deadlines and dispute resolution procedures for claims against the Reliance.
3. Genesis Consolidated Services (referred to herein as "Claimant" or "Genesis"), originally submitted Proof of Claim Number 2158965 ("POC 2158965") dated November 6, 2006. POC 2158965, submitted under Policy Number NWA0128431-00², sought a claim amount of \$31,414.00 for, according to the proof of claim form, "return of unearned premium or other premium refunds". According to attachments filed by the Claimant with POC 2158965, the amount claimed was "based upon a recent audit conducted by Reliance Insurance Company (Reliance) indicating an agreed upon accounts receivable to Genesis in the amount of \$31,414."

¹ Joel S. Ario has been appointed by the Governor to serve as Insurance Commissioner, and, as such, replaces Ms. Koken as the statutory Liquidator.

² All policies involved here are workers compensation policies.

"Referee's Decision EXHIBIT A"

4. In response to POC 2158965 the Liquidator issued a Notice of Determination ("NOD") to Claimant, dated December 5, 2006, setting a claim priority level of e³. This NOD did not fix a claim valuation. No objection was filed to this NOD.
5. Claimant submitted a second Proof of Claim under Policy Number NWA0128431-00 dated October 30, 2007 (herein referred to as "Amended POC 2158965"). Amended POC 2158965 sought a claim amount of \$38,315.00 for "our 10th Retro Adjustment of \$38,315." According to attachments filed by the Claimant with Amended POC 2158965, the amount claimed was based upon a retro calculation generated and issued by Reliance October 18, 2007.
6. In response to Amended POC 2158965 the Liquidator issued an Amended NOD to Claimant, dated November 11, 2007, setting a claim priority level of e. No valuation was made regarding this claim.
7. Claimant submitted Proof of Claim Number 2158966 ("POC 2158966") dated November 6, 2006. POC 2158966, submitted under Policy Number NWA0136554, sought a claim amount of \$32,066.00 for, according to the proof of claim form, "return of unearned premium or other premium refunds". According to attachments filed by the Claimant with POC 2158966, the amount claimed was "based upon a recent audit conducted by Reliance Insurance Company (Reliance) indicating an agreed upon accounts receivable to Genesis in the amount of \$32,066."
8. In response to POC 2158966 the Liquidator issued an NOD to Claimant, dated December 5, 2006, setting a claim priority level of e. No valuation was made regarding this claim. No objection was filed to this NOD.
9. Claimant submitted a second Proof of Claim under Policy Number NWA0136554 dated October 30, 2007 (herein referred to as "Amended POC 2158966"). Amended POC 2158966 sought a claim amount of \$32,072 for "our 9th Retro Adjustment of \$32,072." According to attachments filed by the Claimant with Amended POC 2158966, the amount claimed was based upon a retro calculation generated and issued by Reliance October 18, 2007.
10. In response to Amended POC 2158966 the Liquidator issued an Amended NOD to Claimant, dated November 11, 2007, setting a claim priority level of e. Again, No valuation was made regarding this claim.
11. By letter dated November 25, 2007 Claimant filed an Objection to the Notice of Determination of the Liquidator to Proofs of Claim Numbers 2158965 and 2158966 ("Objections").⁴
12. In its Objections, Claimant argues that the monies due from Reliance to Claimant are loss payments and should not be categorized as unearned premium, premium refunds or claims of general creditors. As such, Claimant contends that its claim should be classified as a Class b claim - claims under policies for losses - not a Class e claim.

³ The relevant language of 40 P.S. § 221.44(e) states:

The order of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class.

(e) Claims under nonassessable policies for unearned premium or other premium refunds and claims of general creditors.

⁴ On its face, Claimant's letter does not specify whether its objection is to the Liquidator's original NODs to POCs 2158965 and 2158966 or to the Liquidator's NODs to Amended POCs 2158965 and 2158966. Because objections to the original NODs issued December 5, 2006 are far beyond the sixty day filing deadline (as prescribed by the Court's September 9, 2002 Claims Procedure Order), we conclude that Claimant is objecting to the Liquidator's NODs to the Amended POCs 2158965 and 2158966 issued November 11, 2007.

13. On December 20, 2007 the Liquidator filed, with the Court, a response to Claimant's Objection to the NOD.

14. By Order of the Court dated December 5, 2007 the undersigned was appointed Referee, to provide findings of fact and a recommendation to the Court regarding issues raised by Claimant.

THE CONFERENCES

15. By agreement of the parties' representatives, a conference, via telephone, was held January 3, 2008 involving counsel for the Liquidator, S. Emy Poulad, Esquire and Genesis' representative Chris J. Daft.

16. Claimant objected to the Liquidator's classification of the claim at Priority Level e, arguing that its claim, under a workers compensation loss sensitive program, was not for premium but for paid losses. Therefore, the Claimant argued that the claim should be categorized as Priority Level b.

17. The Liquidator reiterated its position that Claimant's claim is for retrospective premium and, as such, must be classified at Priority Level e pursuant to the Liquidation Statute and Reliance's Order of Liquidation. The Liquidator also contended that, since Claimant's original POCs were for premium refunds, any suggestion that the claim is for anything but premium is specious.

18. By agreement of the parties, a briefing schedule was established and a second conference set for February 22, 2008.

19. Subsequent to submission of briefs, a second conference, via telephone, was held February 22, 2008 involving counsel for the Liquidator, S. Emy Poulad, Esquire and Genesis' representative Chris J. Daft. The parties presented closing arguments. It was agreed that a factual hearing was not required.

ISSUE

20. The underlying policies relating to the Claimant's POC are Loss Sensitive Retrospective Rating workers compensation insurance policies allowing for adjustments based upon losses generated during the policy period. The question raised is whether a claim for retrospective adjustments by a policyholder against Reliance is a loss claim properly assigned to class (b) (40 P.S. § 221.44(b)) or a claim for audit premium or return of premium which is assigned to class (e) (40 P.S. § 221.44(e)).

DISCUSSION

This matter involves the interpretation of Insurance Department Act, Section 544 of the Act of May 17, 1921, P.L. 789, *as amended*, 40 P.S. §221.44 (the "Act"), which sets forth an order of distribution of claims from an insurer's liquidated estate. In interpreting a statute we must ascertain and apply the intention of the Legislature as set forth in the statute. 1 Pa.C.S. §1921. The Legislature has designated that the Act be liberally construed to effect the purpose of the Act. 40 P.S. §221.1(b). The purpose of the Act is to protect the interests of the insureds, creditors, and the public generally. 40 P.S. §221.1(c). However, in interpreting and applying the Act, we must give effect to the entire statute, favor the public interest as against any specific private interest, and avoid absurd results. 1 Pa. C.S. §1922. 40 P.S. §221.44, directs that:

The order of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class.

(b) All claims under policies for losses wherever incurred, including third party claims, and all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies, shall have the next priority. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment made by an employer to his employee shall be treated as a gratuity.

It is undisputed that the underlying workers compensation policies at issue are Loss Sensitive Retrospective Rating workers compensation insurance policies. Claimant, in its brief, provides significant analysis defining and attempting to distinguish the Loss Sensitive Retrospective Rating policies and the more common Guaranteed Cost policy. Claimant acknowledges that adjustments under a Guaranteed Cost policy are audit premium but argues that, since the Loss Sensitive Retrospective Rating policies are subject to adjustments based upon, inter alia, losses, those adjustments (in this case the claimed credits) are losses as defined by claim category (b) of the Liquidation Statute (40 P.S. § 221.44(b)). We agree that there are differences between these two policy types particularly as to the method (or formula) of determining credit adjustments, but the manner of calculating these adjustments does not alter what the resultant adjustment is – premium adjustments.

The following are generally accepted industry definitions for Guaranteed Cost policy
Loss Sensitive Retrospective Rating policy

The Guaranteed Cost policy is a workers compensation insurance policy that is not subject to adjustment due to losses that occur during the policy term. In a guaranteed cost policy, the only variable affecting premium that should change between policy inception and audit is payroll.

The Loss Sensitive Retrospective Rating policy is a workers compensation insurance policy that makes a subsequent adjustment to premium, *based upon losses* generated during the policy period. The adjustment can go up or down, within set parameters, based on the losses generated during the policy period.⁵

⁵ Claimant, in its brief, references a retrospective workers compensation insurance program it entered with Zurich North America ("Zurich NA"). We looked to Zurich NA for a description of their retrospective insurance program and found the following:

"Retrospective Rating Program - You pay the same "standard premium" that you would pay under a traditional guaranteed cost program. All losses are reported to and handled by Zurich. Six months after policy expiration (and annually thereafter until all claims are closed) Zurich does a retrospective rating adjustment, and *you will receive either a premium credit or a charge, based on your actual loss experience*" [emphasis added]

For a detailed description and analysis of a Loss Sensitive Retrospective Rating policy see Couch on Insurance 3rd Edition, §69:15

Contrary to Claimant's assertion, the amounts sought in the POCs, both the original two and the amended POCs, are for premium refunds. As the Liquidator correctly proffers, Claimant never paid claims, it paid premiums, as such it is entitled under the policies to only premium credits not reimbursement for losses.

Even if we ignore industry practice, the Claimant in its initial filings, POC 2158965 and POC 2158966, categorized its claims as "return of unearned premium or other premium refunds."⁶ Other than a recalculation of credits, nothing changed between the originally filed POCs and the Amended POCs. In addition, attached to each of Claimant's POCs (original and Amended), and as exhibits to its brief, were accounting documents that set forth the calculations to support the adjustments claimed due. These documents are captioned "Retrospective Premium Adjustments."⁷

Claimant has been unable to provide any evidence demonstrating that the amounts sought in its POCs are paid losses as defined by 40 P.S. § 221.44(b), under the respective policies, i.e. reimbursements for workers compensation payments made to any insured beneficiaries under the two policies. The mere fact that Claimant's loss performance against the policy was favorable, i.e. retrospective adjustments, (and thus resulting in credits to Claimant) does not change the identity of the credits. Favorable loss activity results in a premium credit thus the term retrospective premium adjustment.

⁶ Claimant suggests that Reliance, by reissuing the Billing Statement and accepting the Amended POCs has waived any argument premised upon the original POCs. Claimant provided no authority for this position, and although novel, we reject it.

⁷ Claimant, during argument on February 22, 2008 acknowledged that (regarding the pending claims) it had not paid losses to any policy beneficiaries. Paid losses were made either by Reliance, or now by the various state Guaranty Funds. Claimant's only payout was to Reliance for premiums. Claimant reiterated however that its pending Claims are adjustments based upon favorable loss ratios.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania,
Plaintiff

VI.

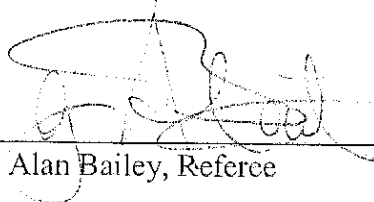
Reliance Insurance Company,
Defendant

No. 269 M.D. 2001

POC No. 2158965 & 2158966

NOTICE TO PARTIES

As set forth in the Commonwealth Court Claims Filing Order of September 9, 2002, exceptions, if any, to the Referee's recommendations shall be filed with the Commonwealth Court of Pennsylvania within fifteen (15) days after service of the Referee's Recommendations. Exceptions should be accompanied by a supporting memorandum of law. Failure to file timely exceptions to the Referee's Recommendations shall be deemed a waiver of any and all exceptions and bars Claimant from raising any issues which could have been raised as exceptions.



G. Alan Bailey, Referee