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BEFORE THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of PEETERS TRANSPORTATION COMPANY, INC., Appellant, From a Decision of THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA, Respondent.	FILE NO. ALB-WCA-92-2

DECISION

Peeters Transportation Company, Inc. (hereafter "Peeters") appeals from a decision of the Workers Compensation Insurance Rating Bureau ("WCIRB" or "Bureau"). WCIRB is a rating organization licensed pursuant to Insurance Code sections 11750, et seq.

The facts in this matter are not in dispute. In 1986, Peeters was insured by Royal Indemnity Company ("Royal") under a workers' compensation insurance policy. Royal paid several claims on Peeters's behalf. Royal subsequently recovered some of the amount it paid pursuant to subrogation rights but failed to

inform the WCIRB of these recoveries. As a result, WCIRB used the full amount Royal paid on the 1986 claims in calculating Peeters's experience modification ("x-mod") for the periods beginning in April of 1988, 1989 and 1990. These x-mods caused Peeters's workers' compensation premiums to rise dramatically.

In November 1988, Peeters informed Royal of the reporting error. However, Royal did not report the subrogation recoveries to WCIRB until October 1990 at which time Royal requested that WCIRB recalculate Peeters's x-mod for the 1988, 1989 and 1990 time periods.

Citing Section IV, Rule (7) of the California Experience Rating Plan, the WCIRB staff recalculated Peeters's x-mod for only 1989 and 1990 and left the 1988 x-mod changed. In the staff's view, Rule (7) permitted recalculation of the 1989 and 1990 x-mods but Royal's reporting of the subrogation recoveries came too late for WCIRB to adjust the 1988 x-mod. Peeters appealed to the WCIRB's Classification & Rating Committee which affirmed on January 14, 1992.

Peeters now appeals to the Insurance Commissioner pursuant to Insurance Code section 11753.1. A hearing was held on September 8, 1994 following which the parties submitted post-hearing briefs. This matter was submitted on October 4, 1994.

Peeters's Position

Peeters maintains that WCIRB should have recalculated its 1988 x-mod and presents three arguments in support of its

position. First, Peeters contends that a 1992 amendment to Section IV, Rule (7) should be applied to this matter. These revisions provide that

> "where [an insurance] carrier has received reimbursement, or credits against future payments under subrogation rights, ... a revised reporting shall be filed with the Bureau and it shall be used to adjust the current and two immediately preceding ratings ... ."

(emphasis added.) The prior version of the rule which was in effect when Royal reported the subrogation recoveries in October 1990 provided that such revised reporting "shall be used to adjust the current and immediately preceding rating ... ." (emphasis added.) Peeters argues that the 1992 amendment should be given retroactive effect since it is "procedural" in nature, similar to an amendment enlarging a period of limitations.

Second, Peeters argues that even if the 1992 amendment is found not to apply, the prior version of Section IV, Rule (7) allowed for adjustment of its 1988 x-mod because it incorporated paragraph 11 of General Rule VII which provided that the revised experience modification shall be effective "as of the effective date of the erroneous modification." Peeters interprets this phrase as including the 1988 policy year.

Finally, Peeters argues that the WCIRB's application of its rules is unfair and inequitable. Peeters states that it has paid more than it should in premiums solely because of Royal's failure to report the subrogation recoveries to WCIRB in a timely manner.

Peeters cites to several prior decisions where the Commissioner has ruled that an insured should not be bear the burden of a communication problem caused by the insurer.[1]

WCIRB's Position

WCIRB maintains that it properly applied the rules that were in effect in October 1990 in denying Peeters's request for an adjustment to its 1988 x-mod. In response to Peeters's argument for retroactive application of the 1992 amendment, WCIRB states that the amendment was intended to apply prospectively and, therefore, should not be applied retroactively. It also disputes Peeters's contention that procedural rules may be applied retroactively.

Regarding paragraph 11 of General Rule VII, WCIRB contends that the 1990 version limited adjustments due to discovery of an error to "the current experience modification or immediately preceding experience modification." It also maintains that this provision applies only to "publication" of the x-mods.

Finally, WCIRB states that while it is regrettable that Peeters's may have been harmed by Royal's failure to report the subrogation recoveries in a timely manner, Peeters's remedy lies

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[1] Peeters cites to In the Matter of the Appeal of Vista Fence Co., Inc. (SF 6960-R-021) (February 19, 1993, amended March 12, 1993), In the Matter of the Appeal of Grayson Services, Inc. (SF 6960-R-83) (May 20, 1991) and In the Matter of the Appeal of Sierra Children's Home (SF 6960-R-98) (December 13, 1990). It also notes a contrary result in In the Matter of the Appeal of San Carlos Agency, Inc. (SF 6960-R-022) (May 7, 1993).

in a civil action against Royal not in an order from the Insurance Commissioner. WCIRB contends that all but one of the Commissioner's decisions cited by Peeters are distinguishable and that we should follow the San Carlos Agency decision in deciding this matter.

Discussion

As described above, WCIRB interpreted the rules as they stood in October 1990 as barring it from adjusting any x-mods other than those in effect for the current and immediately preceding year. While this is one possible interpretation of the rules, we believe that it is an unduly mechanical one.

WCIRB correctly points out that the rules of statutory construction also apply to construing regulations. Under these rules, a "provision must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, ... which upon application will result in wise policy rather than mischief or absurdity." In addition, "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." DeYoung v. City of San Diego (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722, 726].

Under Insurance Code sections 11730, et seq., the Commissioner may approve a system of "merit rating" "in which the California workers' compensation insurance experience of the particular insured is used as a factor in raising or lowering his

rate." Section 17730. Pursuant to this authority, the Commissioner has adopted the California Experience Rating Plan. 10 Cal.Code Reg. Section 2353. Among other things, the Plan requires that insurers report insureds' loss experience to WCIRB in order that WCIRB may determine the correct x-mod to be applied. As counsel for WCIRB acknowledged at the hearing, this obligation includes the timely reporting of any subrogation recoveries.

In this case, Royal did not report the subrogation recoveries in a timely manner. The evidence is undisputed that, in November 1988, Peeters informed Royal of the failure to report the subrogation recoveries but Royal did not actually correct the problem until October 1990. The record is silent as to precisely why it took Royal nearly two years to follow up on Peeters's information but correspondence from Royal to WCIRB acknowledges "mishandling by the Company." See Record of Documents & Exhibits of Respondent WCIRB filed June 30, 1994 (hereafter "Record") at 21. There is no evidence that Peeters was responsible for the delay in reporting.[2]

If Royal had reported the subrogation recoveries in a timely manner, WCIRB would have adjusted Peeters's 1988 x-mod to reflect those recoveries. The evidence shows that had Royal reported those recoveries even six months earlier than it did, WCIRB would

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[2] We note that WCIRB's Classification & Rating Committee also "carefully reviewed the facts presented by Mr. Peeters" and "agreed that Mr. Peeters was not responsible for the delay in filing the report." Record at p. 16.

have adjusted Peeters 1988 x-mod. The Classification & Ratings Committee Minutes regarding Peeters' request for correction of its 1988 x-mod states

> "Upon receipt of this request, the Bureau staff reexamined the file and determined that the revised report was received six months after Rule (7) would have permitted a revision of the 1988 experience modification."

Record at p. 15.

In light of this evidence, we believe that it is proper to direct WCIRB to recalculate Peeters's 1988 x-mod to reflect the subrogation recoveries. This result is consistent with the overall intent of the experience rating plan that the "experience of the particular insured be used as a factor in raising or lowering his rate."

A contrary decision would undermine this intent. If WCIRB is barred from adjusting an x-mod beyond the period stated in Section IV, Rule (7) regardless of the insurer's failure to make timely reporting, insurers would have an interest in delaying reporting subrogation recoveries for as long as possible. For example, assuming that an insurer is obligated to report subrogation recoveries in Year 1 but delayed reporting those recoveries until Year 3, under WCIRB's interpretation of the pre-1992 version of the rule, the Bureau could adjust the x-mod for Years 2 and 3 (i.e., the current period and immediately preceding period). WCIRB would be unable to correct the x-mod for Year 1

allowing the insurer to retain the excess premium for that year. If the insurer delayed reporting until Year 4, under WCIRB's interpretation, the Bureau would be able to correct the x-mods for Years 3 and 4, but would be unable to correct the x-mods for Years 1 and 2 allowing the insurer to retain the excess premium for two years. (This same incentive to delay reporting would exist if the 1992 version of the Section IV, Rule (7) was interpreted in the manner urged by WCIRB.) We do not believe that Section IV, Rule (7) should be construed in a manner which would encourage such perverse results.[3]

We also disagree with WCIRB's contention that the appeal should be denied because Peeters could pursue a civil remedy against Royal. Adopting this reasoning would be contrary to the general public policy favoring prompt, efficient resolution of disputes.[4] We note that it has been nearly six years since

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[3] See Granberry v. Islay Investments (1984) 161 Cal.App.3d 382, 388 [207 Cal.Rptr. 653] (citations omitted, emphasis original), wherein the Court states

> "One of the cardinal rules of construction requires that words be given such interpretation as will promote rather than defeat the general purpose and policy of the law. A statute should be interpreted so as to produce a result that is reasonable. ...
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> "The words of a statute will not be literally construed if this would cause an absurd result, or if it would fail to give effect to the manifest purpose of the statute in light of its legislative history."

[4] See, for example, Summit Industrial Equipment v. Koll/Wells Bay Area (1986) 186 Cal.App.3d 309, 320 [230 Cal.Rptr. 565] (noting "the public policy favoring resolution of disputes short of litigation") and Jackson v. City of Sacramento (1981)

Peeters brought the problem to Royal's attention and over four years since Royal reported the subrogation recoveries to WCIRB. No constructive purpose is served by directing Peeters to seek relief in another forum.

To the extent that the prior decisions cited by Peeters have precedential value, the result here is consistent with the Sierra Children's Home and Grayson where the Hearing Officer concluded that the insured should not be penalized because the insurer failed to provide information to WCIRB in a timely manner. It is also consistent with Vista Fence where the Hearing Officer concluded that the insured should not be penalized when the insurer failed to inform the insured of actions directly affecting the insured's premiums.

We decline to follow San Carlos Agency. While that decision applied Section IV, Rule (7) in the manner urged here by WCIRB, it did not attempt to construe the phrase "current and immediately preceding rating" in light of the insurer's obligation to report subrogation recoveries in a timely manner. Nor did San Carlos Agency explain how adopting the interpretation urged by WCIRB was consistent with the overall purpose and intent of the experience rating plan. For these reasons, we do not find this decision to be persuasive authority. As discussed above, we

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117 Cal.App.3d 596, 603, fn. 3 [172 Cal.Rptr. 826] (noting "California's public policy of insuring expeditious resolution to disputes").

have considered these factors in this matter and reach a different result.

Since we are deciding this matter based on the rules that were in place in October 1990 construed in light of the overall intent of the experience rating plan and the insurers' obligation to report subrogation recoveries to WCIRB in a timely manner, we are not reaching the issue of retroactive application of the 1992 amendments to those rules.

ORDER

For the reasons stated above, IT IS ORDERED that Peeters's 1988 x-mod should be recalculated to reflect the subrogation recoveries reported by Royal. This decision and order is effective in 30 days.

Date: October 25, 1994

CARL K. OSHIRO
Administrative Law Judge