

**DEPARTMENT OF INSURANCE  
ADMINISTRATIVE HEARING BUREAU  
45 Fremont Street, 22nd Floor  
San Francisco, CA 94105  
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**BEFORE THE INSURANCE COMMISSIONER**

**OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of	)	
	)	<b>FILE AHB-WCA-03-80</b>
<b>AIKEN CARS, INC., dba RIVERSIDE MITSUBISHI</b>	)	
	)	<b>ORDER ADOPTING</b>
Appellant,	)	<b>PROPOSED DECISION</b>
	)	<b>AND</b>
From the Decision of	)	<b>DESIGNATING</b>
	)	<b>PORTION OF DECISION</b>
<b>THE WORKERS' COMPENSATION INSURANCE</b>	)	<b>AS PRECEDENTIAL</b>
<b>RATING BUREAU OF CALIFORNIA</b>	)	
	)	
Respondent.	)	
_____	)	

The attached proposed decision of Administrative Law Judge David R. Harrison is adopted as the Insurance Commissioner's decision in the above-entitled matter. This order shall be effective October 21, 2004. Judicial review of the Insurance Commissioner's decision may be had pursuant to California Code of Regulations, title 10, section 2509.76.

Persons authorized to accept service on behalf of the Insurance Commissioner are listed below:

Chief Counsel Gary Cohen  
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In addition, any party seeking judicial review of the Insurance Commissioner's decision shall lodge copies of the writ of administrative mandamus and the final judicial decision and order on the writ of administrative mandamus with the Administrative Hearing Bureau of the California Department of Insurance.

IT IS FURTHER ORDERED that pages 17 to 20, holding that the appeal procedures under Cal. Code of Regulations, title 10, §2509.40 et seq. provide due process to appellants, are hereby designated as precedential.

DATED: 9/21/, 2004

John Garamendi  
Insurance Commissioner

By: /s/  
**JANICE E. KERR**  
Special Counsel

Thus, in *Rupf v. Yan* (2000) 85 Cal.App.4<sup>th</sup> 411, the court rejected a substantive due process claim, applying the following standard (85 Cal.App.4<sup>th</sup> 411, 420-421):

*B. Substantive due process claim.*

\* \* \* Although not entirely clear, it appears appellant's claim is that section 8102 is facially invalid and denies him substantive due process under our state and federal Constitutions. (Cal. Const., art. I, § 7; U.S. Const., 5th & 14th Amends.)

The standard of review for this claim is well settled. The legislative scheme may not be arbitrary or capricious, but must have a real and substantial relationship to the goal sought to be obtained. (*Coleman v. Department of Personnel Administration* (1991) [52 Cal.3d 1102](#), 1125 [278 Cal.Rptr. 346, 805 P.2d 300].) A distinction within a legislative scheme is not arbitrary if any set of facts would support it. (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) [6 Cal.3d 719](#), 739 [100 Cal.Rptr. 301, 493 P.2d 1165].)

Using the standard set forth in the *Rupf* decision, and for the same reasons that appellant's equal protection claim is without merit, so also are its claims for violation of substantive due process.

***2. Procedural Due process standards are met in that the statutes and regulations applicable to these proceedings provide for full and fair hearings for a complaining party.***

The remaining issue is whether Aiken has been denied *procedural* due process. For the reasons discussed below, the claim is determined to be without merit.

This very proceeding constitutes a due process hearing in which Aiken is able to present all relevant evidence that it deems helpful to its cause.

Insurance Code section 11753.1 provides that any party aggrieved by a decision of a rating organization<sup>1</sup> may request reconsideration and, if the request is rejected, may appeal

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<sup>27</sup>A rating organization is defined at Insurance Code section 11750.1 as an organization formed primarily to collect "loss and expense statistics and other statistical information;" to make "pure premium rates and those rating plans authorized by Section 11734 for workers' compensation insurance \* \* \* and presenting them to the commissioner for approval." The WCIRB is the only licensed rating organization in California for workers' compensation insurance.

directly to the Insurance Commissioner. Hearings before the Commissioner are conducted by the Administrative Hearing Bureau of the Department of Insurance under the administrative adjudication provisions (Government Code §§11400 - 11475.70)<sup>2</sup> of the California Administrative Hearing Act and under administrative regulations (Cal. Code Regs., tit. 10, §§2509.40 – 2509.78), specifically governing appeals to the Insurance Commissioner in workers’ compensation cases.

The administrative adjudication provisions of the Administrative Hearing Act were enacted in 1995 (operative July 1, 1997), and present a detailed codification of how administrative adjudication proceedings must be conducted. The Commissioner’s special regulations (§§2509.40 – 2509.78, *supra*) were adopted in 1999 and govern the course such proceedings must take in workers’ compensation appeals.

The cited statutes and regulations provide, *inter alia*, for representation of the parties by lawyers or other persons; pre-hearing exchanges of information, whether voluntary or through subpoena (*id.* at §§2509.59- 2509.60, 2509.62(c)); determination of burdens of proof (§2509.61); conduct and management of full and fair hearings before an unbiased administrative law judge (§2509.58)<sup>3</sup>; introduction of evidence, argument, and rebuttal (§2509.62); traditional rules of privilege (*ibid.*), and a qualified hearing reporter (§2509.64). Finally, the decision ultimately rendered by the Commissioner is specifically reviewable by mandamus proceedings (*id.* §2509.76).

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<sup>28</sup> Note particularly “Administrative Adjudication Bill of Rights,” Government Code, sections 1425.10 – 11425.60, including sections 11425.10(5) and 11425.40, relating to bias, prejudice or interest of a presiding officer.

<sup>29</sup>*Ibid.*

Describing what is sufficient to satisfy due process requirements, the Court in *Dinwiddie* noted (745 F. Supp. 589, 594-595):

Nor is there any evidence of a denial of procedural due process in this case. “An irrebuttable presumption<sup>4</sup>] is not per se unconstitutional and does not demand an individualized hearing so long as it is rational. \* \* \* No provision for a hearing with a particularized inquiry to replace a legislative determination is necessary for *economic* regulations. *Id.* (Emphasis supplied.)

\* \* \*

Further, *Dinwiddie* concedes that it was afforded two administrative hearings, at which it received usual procedural protections such as representation by counsel; ability to call witnesses; and ability to submit oral and documentary evidence; cross-examining witnesses; and arguments on its claims. \* \* \* These procedural safeguards were ample to protect *Dinwiddie*’s rather minimal interest in obtaining its rate adjustment for the new three-year period.

Therefore, *Dinwiddie* cannot succeed on its claim that Rule 8 functioned to deny it procedural due process.

The administrative adjudication provisions of Government Code sections 11400 - 11475.70 and the specific regulations of the Insurance Commissioner at title 10, sections 2509.40 – 2509.78, *supra*, were adopted after *Dinwiddie* was decided. They further assure that requisite procedural due process is afforded in cases of this type.<sup>5</sup>

The California Insurance Code grants appellant the right of appeal to the Insurance Commissioner. The California Government Code and the administrative regulations applicable

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<sup>30</sup> In *Dinwiddie*, the “irrebuttable presumption” was that a material change in ownership, by itself, was a sufficient change to eliminate the prior history of the business for experience modification purposes.

<sup>31</sup> The California Law Revision Commission Comments on section 11410.10 state:

The coverage of this chapter is the same as coverage by the existing provision for administrative mandamus under Code of Civil Procedure Section 1094.5(a). That section applies only where an agency has issued a final decision “as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency].” Numerous cases have applied Code of Civil Procedure Section 1094.5 broadly to administrative proceedings in which a statute requires an “administrative appeal” or some other functional equivalent of an evidentiary hearing for determination of facts – an on the record or trial type hearing.

The intent seems to be to clarify that standards equivalent to 1094.5 standards are to be applied in cases beyond those strictly delineated in section 1094.5.

to this appeal provide the traditional safeguards that govern judicial proceedings in American civil courts. In view of the rights of appeal and the safeguards provided, no violation of due process rights is entailed in application of the ERP Change in Status rules. Appellant's claim that it has been denied due process is without merit.

### **CONCLUSIONS**

1. The Rating Bureau correctly applied the ERP Change in Status rules to Aiken's purchase of the Cars USA business and correctly determined that the pre-acquisition Cars USA experience should apply in determining Aiken's post-acquisition experience modification factors.
2. The Bureau's application of the Change in Status rules did not constitute a violation of the equal protection clauses of the United States or California Constitutions, because there is a clear, rational relationship between the rules and a legitimate state interest. For the same reason, their application did not result in a violation of Aiken's substantive due process rights.
3. The ERP Change in Status rules do not *unfairly* discriminate between a new business that purchases its inventory from normal supply sources, and a new business that purchases its inventory by bulk purchase from an established business where, in addition to making the bulk purchase, the new business continues the prior business without a material change in operations or employees.
4. The hearing and review procedures applicable to these proceedings comply with federal and state constitutional standards of procedural due process, and appellant's due process rights have not been violated.

### **ORDER**

The Rating Bureau's decision of November 17, 2003, carrying over the experience of Cars USA to Aiken Cars, and resulting in application of a 178% (August 21, 2002 to March 16, 2003), and a 154% experience modification (March 17, 2003 to August 21, 2003) to Everest National Insurance Company Workers' Compensation Insurance Policy No. 390-35883-21 issued to Aiken Cars, Inc. for the policy year beginning August 21, 2002 is affirmed.