STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: APRIL 26, 2012)

INSURANCE RECONSTRUCTION SERVICES, INC.	:	
v.	:	**C.A. No. PB 10-2490**
THE BEACON MUTUAL INSURANCE COMPANY; MASTORS & SERVANT, LTD.; and STARKWEATHER & SHEPLEY INSURANCE BROKERAGE INCORPORATED	:	

DECISION

SILVERSTEIN, J. Before the Court is Plaintiff Insurance Reconstruction Services, Inc.'s (IRS) Motion for Partial Summary Judgment (Motion), pursuant to Super. R. Civ. P. 56, on the issue of liability. IRS avers that there are no genuine issues of material fact and moves the Court to enter judgment as a matter of law that IRS paid excess premiums to and is entitled to refunds from its workers' compensation insurer, The Beacon Mutual Insurance Company (Beacon Mutual). Beacon Mutual opposes the Motion, arguing, among other things, that refunds of overpaid premiums are limited to the current policy period.

I

Facts and Travel

IRS is a contractor specializing in property damage mitigation, reconstruction, remediation, and restoration following disasters such as fires and floods. (2d Am. Compl. (hereinafter Compl.) ¶ 5; John E. Anderson Aff. ¶¶ 2-3, Jan. 9, 2012.) IRS purchased a Beacon Mutual workers' compensation insurance policy in October 2002 through Mastors & Servant,

Ltd. (Mastors), a registered insurance agent. (Compl. ¶ 6.) IRS continued purchasing yearly workers' compensation policies from Beacon Mutual from October 2002 until October 2008. Id.; Anderson Aff. ¶ 5. Beginning in the 2005-2006 policy year, Starkweather & Shepley Insurance Brokerage Incorporated (Starkweather) replaced Mastors as the insurance agent for the policy from Beacon Mutual. (Compl. ¶ 11.)

Workers' compensation premiums are determined by assigning employers classifications that correspond to an estimate of the employees' exposure to risk during the policy period. (Anderson Aff. Ex. A (hereinafter Policy).) The Workers' Compensation and Employers' Liability Policy (the Policy) issued by Beacon Mutual provides that a final premium is determined at the end of the policy period based on the actual, not estimated, premium basis and classifications.[1] Id. Adjustments from the estimated premium to the final premium are charged or credited, as appropriate, to the insured. Id.

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[1] The Policy provides, in pertinent part:

> "The Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy. Changes of classification shall not be deemed an amendment of this policy." (Policy, Part Five (D).)

Further, the Policy provides:

> "The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined at the end of each policy period using the actual, not the estimated, premium basis and the proper classifications, modification factors and rates that lawfully apply to the business and work covered by this policy as well as premium surcharges as allowed by law; provided, however, that if you do not comply with Section I (Audit) of this part, we may determine the final premium by using our revised estimates of the relevant information. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund or credit the balance

Beacon Mutual assigned the classifications used to determine the premiums charged to IRS. (Anderson Aff. ¶ 8.) However, the premium rates and the classifications used by Beacon Mutual were established by the National Council on Compensation Insurance, Inc. (NCCI). (Anderson Aff. ¶ 6.) Beacon Mutual asserts that it is required by Rhode Island law to adhere to the rating and classification system established by NCCI. (Robert G. DeOrsey Aff. ¶ 1, Mar. 19, 2012.) It further asserts that it is governed by NCCI's Basic Manual and NCCI's Scopes Manual, which establish the classification categories and the rules relating to classification. Id.

In the autumn of 2008, IRS became aware that some of its employees may have been misclassified, and IRS notified Beacon Mutual of this potential misclassification in December 2008. (Compl. ¶¶ 14-15; DeOrsey Aff. ¶ 8.) In response, Beacon Mutual conducted an audit of IRS' payroll on January 22, 2009 and produced a Premium Audit Report. (Anderson Aff. ¶ 14, Ex. C.) The report findings indicate that, following the audit, Beacon Mutual reclassified a total of eleven IRS employees and removed one from coverage for the policy period of October 1, 2007 to October 1, 2008.[2] (Anderson Aff. Ex. C.) The changes in classifications resulted in a decrease in the premium charged to IRS, but the Premium Audit Report findings stated that the premium could only be revised for that policy period. See id. Accordingly, Beacon Mutual refunded the overpaid premium for the 2007-2008 policy period, but refused to refund prior years. (Anderson Aff. ¶¶ 21-22; DeOrsey Aff. ¶¶ 8-12; Compl. ¶ 16.)

> to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy." (Policy, Part Five (G).)

[2] Specifically, eight of the eleven employees had been classified as code 5445, for workers performing wallboard installation, and should have been classified as code 9014, for buildings operations by a contractor. (Anderson Aff. ¶¶ 10, 16.) Two other employees were reclassified from code 5445 to code 8742, for appraisers. (Anderson Aff. ¶ 17.) One employee was reclassified from code 8017, for retail, to code 8810, for clerical bookkeepers. (Anderson Aff. ¶ 19.) Finally, one employee was removed from the policy because he was covered under a separate Connecticut workers' compensation policy. (Anderson Aff. ¶ 18.)

To attempt to recover any overpayment in the prior policy periods, IRS filed its original Complaint in this action on April 28, 2010. Amended Complaints were filed on May 19, 2010 and on November 10, 2010. The Second Amended Complaint (Complaint) alleges negligent misrepresentation by Mastors (Count I) and Beacon Mutual (Count II), unjust enrichment by Beacon Mutual (Count III), negligence by Starkweather (Count IV), and breach of contract by Beacon Mutual (Count V). Essentially, the claims relate to alleged misclassification of several IRS employees throughout prior policy periods from 2002 to 2007.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or on mere legal opinions and conclusions. Hill, 11 A.3d at 113. The opposing party has "an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Lynch v. Spirit Rent-a-Car, Inc., 965 A.2d 417, 424 (R.I. 2009) (quoting Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 46 (R.I. 2001).

Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

IRS presents in its Motion that Beacon Mutual's Premium Audit Report reclassifying several employees constitutes an admission that Beacon Mutual was misclassifying IRS employees in violation of State law. IRS argues that whether an insurer must refund overpaid premiums for past policy periods is an issue of first impression in this State, and this Court should require a workers' compensation insurance carrier to refund all prior overpayments. Conversely, Beacon Mutual proffers that the Premium Audit Report does not constitute an admission of any liability, as Beacon Mutual merely offered to reclassify certain employees for the 2007-2008 policy period in response to IRS' inquiry. Accordingly, Beacon Mutual argues there are substantial disputes whether any employees were misclassified from 2002-2007. Furthermore, Beacon Mutual asserts that the NCCI Basic Manual controls here and limits

refunds of overpaid premiums to the current policy period. The IRS, however, counters that the Basic Manual rules—if controlling—do not limit retroactive corrections in classifications to the current policy period.

Whether employees were misclassified under the five policy periods preceding the audit may be an issue of fact that the Court need not address. If, as Beacon Mutual claims, the Basic Manual controls and limits recovery to the current period, then whether there were any overpayments of premium under the prior policies is of no moment. Therefore, the first—and perhaps only—issue before the Court is whether the rules of the Basic Manual govern the workers' compensation policies between Beacon Mutual and IRS and prevent the insured, IRS, from recovering overpaid premiums from past policy periods.

Generally, workers' compensation insurance rates must be approved by the Rhode Island Department of Business Regulation (DBR). See G.L. 1956 §§ 27-7.1-1, 27-7.1-2, 27-7.1-5.1. Under the statutory scheme, there may exist "one or more advisory organizations licensed in accordance with § 27-9-22 . . . ." Sec. 27-7.1-9.1(a). No advisory organization can provide any service relating to workers' compensation rates without a license under § 27-9-22. Sec. 27-7.1-8.1 (detailing services of advisory organizations). Further, "each workers' compensation insurer shall be a member of an advisory organization" and "[e]ach workers' compensation insurer may adhere to the policy terms filed by the advisory organization." Sec. 27-7.1-9.1(b).

It is undisputed that NCCI is an advisory organization licensed for insurance rating by DBR, pursuant to G.L. 1956 § 27-9-22. See § 27-9-22 (providing licensing of insurance rating organizations); see, e.g. Nat'l Council on Comp. Ins. Loss Costs Level Change Workers' Comp., DBR No. 06-I-0168, at 4 (Dep't of Bus. Regulation Sept. 5, 2006) (providing description of NCCI common in DBR decisions). Carriers of workers' compensation insurance have the option

of adopting the rates approved by DBR for NCCI rather than filing for approval of their own rates. See Heritage Healthcare Servs., Inc. v. Marques, No. PB 06-4420, 2007 WL 2405917 (R.I. Super. Aug. 9, 2007) (Silverstein, J.) ("Insurers could meet their obligations either by filing their own rates, or by joining an advisory organization such as [NCCI], which would file rates on their behalf"); see also Nat'l Council on Comp. Ins. v. Paradis, No. 92-6230, 1994 WL 930908, *9 (R.I. Super. Mar. 2, 1994) (describing NCCI and its role in filing rates); Nat'l Council on Comp. Ins. Loss Costs Level Change Workers' Comp., DBR No. 06-I-0168, at 4 (Dep't of Bus. Regulation Sept. 5, 2006). Further, the Rhode Island statutes expressly permit classifications to be used in establishing rates and premiums. See § 27-7.1-4.1 (providing standards for approval of rates).

In connection with the establishment of its classifications and rates, NCCI issues what are known as a Basic Manual and a Scopes Manual. The Basic Manual includes a Rules section, and within it, Rule 1 relates to classifications. The section relied upon by Beacon Mutual in the case at bar, Rule 1(F)(2), provides:

> "Corrections in classifications that result in a *decrease* in premium, whether determined during the policy period or at audit, must be applied retroactively to the inception of the policy." (Mem. in Supp. of Pl. IRS' Mot. for Partial Summ. J. Against Def. Beacon Mutual Ex. E, Jan. 31, 2012 (emphasis in original) (hereinafter Basic Manual Rule 1(F)(2)).)

Beacon Mutual advocates that this rule precludes refunds of overpaid premiums beyond those dating back to the inception of the current policy. IRS argues that, even assuming the Basic Manual applies, it does not impose such a restraint on IRS' recovery.

This Court is not and has not been made aware of any regulation or statute formally or expressly adopting the Basic Manual. Section 27-7.1-9.1 provides that a workers' compensation insurer "may adhere to the policy terms" of NCCI, but this Court is hard-pressed to find anything

in law obligating Rhode Island insurers and insureds to abide by the Basic Manual's terms. Thus, while NCCI's rates are approved yearly by DBR, what is less apparent to the Court is whether the Basic Manual is approved or adopted by DBR.

The Policy between Beacon Mutual and IRS includes a clause stating, "All premium for this policy will be determined by manuals of rules, rates, rating plans, premium surcharge systems, and classifications we use." (Policy, Part Five (A).) Although this provision likely refers to the Basic Manual, that is not made abundantly clear by the Policy language. Nevertheless, a fellow Superior Court justice has determined that such policy language "incorporate[s] therein by reference" the Basic Manual. See McLaughlin & Moran, Inc. v. State, No. 94-3361, 1996 WL 936959, *5 (R.I. Super. July 25, 1996) (Ragosta, J.). In McLaughlin, a trial court of this State determined policy language providing that "all premiums for insurance policies are determined by manuals of rules, rates, rating plans, and classifications" binds the parties "to operate by the provisions of the Manual as approved by the State of Rhode Island and as directed for use by the DBR." Id. Accordingly, the Basic Manual has been held by a Superior Court justice to "govern the relationship" between the insurer and the insured. Id.

Courts of other jurisdictions have similarly determined the rules within the Basic Manual to be controlling. See, e.g., TTC-The Trading Co. v. Dep't of Consumer and Bus. Servs., 234 P.3d 1056, 1060 (Or. Ct. App. 2010) (relying in part on provisions of Basic Manual regarding NCCI's determination of classifications); Temploy, Inc. v. Nat'l Council on Comp. Ins., 650 F. Supp. 2d 1145, 1148 (S.D. Ala. 2009) (stating Basic Manual and its rules "state-approved" in Alabama); Imagineering, Inc. v. Superintendent of Ins., 593 A.2d 1050, 1052 (Me. 1991) ("Although developed and administered by NCCI, the rules contained in the Basic Manual and the Scopes Manual are equivalent to administrative regulations because they are subject to the

approval and periodic review of the Superintendent of Insurance . . . and have been incorporated by reference into Bureau of Insurance regulations"). Some jurisdictions, like the court in McLaughlin, have determined the Basic Manual to be controlling because the language frequently used in NCCI workers' compensation policies incorporates it. See, e.g., Travelers Indem. Co. v. D.J. Franzen, Inc., 792 N.W.2d 242, 246-47 (Iowa 2010) (stating the Rules section of the Basic Manual incorporated by similar policy language); Travelers Indem. Co. v. Int'l Nutrition, Inc., 734 N.W.2d 719, 727 (Neb. 2007) (determining similar policy language is not ambiguous and effectively incorporates terms of Basic Manual); Home Ins. Co. v. Sunrise Carpet Indus., Inc., 493 S.E.2d 641, 642-43 (Ga. Ct. App. 1997) (holding Basic Manual incorporated by reference under similar policy language). However, some justices have noted in dissent the issues in relying on the Basic Manual, which is often not formally adopted as a regulation in accordance with an Administrative Procedures Act. See Rodriguez v. Romero, 610 S.E.2d 488, 492-93 (S.C. 2005) (Toal, C.J., dissenting) (offering opinion that Basic Manual not controlling authority or intended to replace statute); Avant v. Willowglen Acad., 588 S.E.2d 125, 132 (S.C. Ct. App. 2003) (Anderson, J., dissenting) (arguing in dissent that NCCI rules regarding cancellation of policy should not control because Basic Manual not "formally adopted as regulations in accordance with the Administrative Procedures Act").

A Superior Court case in Maine considered specifically whether the language of Rule 1(F)(2) of the Basic Manual precludes a retroactive refund of overpaid premiums for past policy periods. See Penquis Cmty. Action Program, Inc. v. Maine Superintendent of Ins., No. AP-04-029, 2006 WL 521738, *1-2 (Me. Super. Jan. 23, 2006). In that case, the plaintiff discovered that its workers' compensation classifications were incorrect and its premiums were too high, but the superintendent of insurance granted readjustments for only the recent period and denied

readjustments for past policy periods. Id. at *1. On review, the Maine Superior Court cited Rule 1(F)(2) of the NCCI Basic Manual and stated that "[r]etroactive corrections of classifications are required only when determined during the policy period or audit." Id. at *2. The court described the provision as a "well-established administrative rule that operates to bar any generic claims for reclassification." Id. at *2; cf. Int'l Nutrition, 734 N.W.2d at 727 (holding the Basic Manual clearly states the rule regarding retroactive adjustments of premiums in Rule 1(F)(3)). The Maine court concluded that the insurance superintendent's interpretation of the Basic Manual as not permitting refunds for the prior policy periods was appropriate. Penquis Cmty. Action Program, 2006 WL 521738 at *3.

Here, this Court would be more satisfied if it were aware of a regulation or statute adopting the NCCI Basic Manual; nevertheless, the Court is persuaded that the Basic Manual provisions are controlling at least under these facts. The Policy between IRS and Beacon Mutual provides that the "premium for this policy will be determined by manuals of rules . . . ." (Policy, Part Five (A).) Courts both inside and outside the State have determined such language to effectively incorporate the Basic Manual. See McLaughlin, 1996 WL 936959 at *5 (ruling policy language incorporates Basic Manual by reference and binds parties to it); D.J. Franzen, 792 N.W.2d at 246-47; Int'l Nutrition, 734 N.W.2d at 727. This Policy language here likewise incorporates the Basic Manual and its rules provisions, binding Beacon Mutual and IRS to its terms.

IRS argues, however, that even if Rule 1(F)(2) is controlling, it does not prevent recovery of overpaid premiums in past policy periods. IRS cites to several cases in other jurisdictions for the proposition that refunds on prior years may be required by a court. See Associated Emp'r Lloyds v. Dillingham, 262 S.W.2d 544 (Tex. Civ. App. 1953); Walker v. Bituminous Cas. Corp.,

40 S.E.2d 228 (Ga. Ct. App. 1946); Brown & Root, Inc. v. Traders & Gen. Ins. Co., 135 S.W.2d 534 (Tex. Civ. App. 1939). However, IRS' reliance on these extra-territorial cases is misplaced. None of them consider the Basic Manual or effect of Rule 1(F)(2). Walker held that parties could not privately contract workers' compensation rates, and where the state lowered the rates but the insurer continued charging the originally-contracted rate without the insured's knowledge that the state-mandated rate had been lowered, the insured was entitled to refunds for the entire period. 40 S.E.2d at 230-32. Similarly, the Dillingham court in Texas ruled that parties could not fix a rate other than the state-defined rate, and thus the insurer was owed the difference between the discounted rate it charged and the statutory rate. 262 S.W.2d at 545-46. In Brown & Root, a Texas court again ruled that parties are without power to alter the prescribed workers' compensation rates and ordered refund of the overcharges. 135 S.W.2d at 537-39. Because the Court believes the Basic Manual Rule 1(F)(2) applies here, all of these decades-old cases are inapplicable for their lack of discussion of any rules precluding a refund beyond the current policy period.

A further distinction in the case at bar from the cases cited by IRS is that the parties here did not contract for an unlawful workers' compensation premium rate. Rather, Beacon Mutual charged rates based on classifications it believed to be appropriate. Beacon Mutual aptly points out that classifications may be difficult questions of fact, requiring the exercise of judgment with regard to the employers' varied tasks and generally relying on the information provided by the insured. See DeOrsey Aff. ¶¶ 3-7. While some of the classifications assigned to IRS may (or may not) have been incorrect, this factual situation is distinguishable from that in which insurers or insureds attempt to thwart the statutory mandates of the workers' compensation insurance system by blatantly negotiating their own rates. See Walker, 40 S.E.2d at 230-32 (requiring

refund to comply with rate set by state rather than contract rate); Dillingham, 262 S.W.2d 545-46 (requiring refund to comply with rate set by state rather than discounted, agreed rate between parties).

IRS further argues that Rule 1(F)(2) merely confirms that overpayments should be refunded and was not intended to limit refunds to the current policy period. This Court disagrees with that interpretation of the rule. Courts considering the Basic Manual rules of the same section have determined them to be clearly set forth. See Int'l Nutrition, 734 N.W.2d at 727 (providing that the Basic Manual clearly states the rule regarding retroactive adjustments of premiums); Penquis Cmty. Action Program, 2006 WL 521738 at *2 (describing well-settled rule). This Court does not find any ambiguity in the language providing for retroactive application of corrections in classifications that result in a decrease in premium only to the inception of the policy. See Basic Manual Rule 1(F)(2). When terms are unambiguous, courts apply them as written, giving them their plain and ordinary meaning. See A.F. Lusi Constr., Inc. v. Peerless Ins. Co., 847 A.2d 254, 258 (R.I. 2004). Here, Rule 1(F)(2), as written, limits refunds of overpaid premiums back only to the inception of the policy. As such, IRS is not entitled to refunds for the policy periods prior to the 2007-2008 policy.

IV

Conclusion

After due consideration, the Court denies IRS' Motion for Partial Summary Judgment and rules in favor of Beacon Mutual. The Basic Manual, incorporated by reference in the Policy, permits recovery of overpaid premiums only back as far as the inception of that policy. IRS is not entitled to refunds for any misclassifications in past policy periods. Therefore, to the extent

there were misclassifications, Beacon Mutual is not liable for any prior to the 2007-2008 policy. Prevailing counsel shall present an Order consistent herewith which shall be settled after due notice to counsel of record.