Washington State Farm Bureau

RETROSPECTIVE RATINGS

Relief from retrospective rating assessment

A retrospective rating group will not be relieved of an obligation to pay assessments based on a plan it believed would result in refunds. Retrospective ratings involve the assessment of risk and retrospective rating group must accept that plan choice and claims costs can negatively impact premiums. ***….In re Washington State Farm Bureau*, BIIA Dec., 15 23088 (2018)** [*Editor's note*: The Board's decision was appealed to superior court under Thurston County Cause No. 18-2-06281-8.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WASHINGTON STATE FARM BUREAU	**)**	**DOCKET NOS. 15 23088, 15 23089, 16 21884 & 18 20654**
	)	
FIRM NOS. 00081 & 10670	**)**	**DECISION AND ORDER**

For the coverage years 2011 and 2012, the Department assessed the Washington State Farm Bureau (WFB), a retrospective rating group, $8.45 million dollars. The assessments are based on plan choices made by the WFB under the Department's new retrospective rating program implemented in 2011. The WFB seeks relief from the assessments on equitable estoppel grounds. Our industrial appeals judge determined that the WFB met all five elements for equitable relief from the Department's assessments, but affirmed the Department's orders on the ground that the Board cannot exercise equitable powers. The WFB contends that before the new retrospective rating program was implemented, it historically received refunds, not assessments. It contends that it chose a plan recommended by the Department as the plan that would most likely result in refunds about the same as the WFB received before the 2011 rule changes. The WFB asks the Board to apply the doctrine of equitable estoppel and remand the assessments to the Department with direction to issue an order calculating the assessments consistent with the Department's representations that it would get refunds. The Department also timely filed a Petition for Review asking the Board to make no findings of fact regarding the elements for equitable estoppel, or in the alternative, to determine that the WFB did not satisfy the five prongs for equitable estoppel and to affirm the orders on appeal. We agree with the Department that the WFB did not satisfy the five prongs for equitable estoppel. The Department orders dated November 16, 2015; November 17, 2015; October 26, 2016; and August 18, 2015, are **AFFIRMED.**

DISCUSSION

Retrospective rating is a voluntary financial incentive program offered by the Department "to encourage improvements in workplace safety."[1] Participation in a retrospective rating group gives employers "an opportunity to earn refunds of premiums they are required to pay under chapter 296-17 WAC. However, participation involves risk. Participants not successful in controlling losses can be assessed additional premiums."[2]

[1] WAC 296-17B-010.
[2] WAC 296-17B-010.

The WFB has been a retrospective rating group since 1982. From 2006 through 2011, the WFB had two enrolled retro groups: RRID No. 81, (Classic), and RRID 10607, (Agri-Business). In 2012, the Agri-Business retrospective rating group was discontinued. Until 2011, plan choices for retrospective rating groups were relatively simple with only two real plan choices: plan type and the maximum premium ratio. The WFB historically chose plan B, a loss-based plan, with a maximum premium ratio of 110 percent. Historically, the WFB received refunds nearly every year.

In 2007, the Department began the process of developing a new retrospective rating program. The Department hired an actuarial consultant and began meeting with stakeholders. There were many large group meetings, and one-on-one meetings with individual retro groups or employers. The new retrospective rating plans developed by the Department are more consistent with current industry standards but more complex and required the retro groups to make four plan choices instead of two: (1) whether a portion of their retro premium will be calculated based on developed losses or standard premiums; (2) the single loss limit ($120,000; $250,000; $500,000; $1 million; or no limit); (3) the minimum loss ratio; and (4) the maximum loss ratio. The minimum loss ratio sets the lower limit or floor on the retrospective rating group's aggregate loss ratio. The maximum loss ratio sets the upper limit or cap on the retrospective rating group's aggregate loss ratio.

Additionally, the new rules changed how the Department develops losses. Because not all benefits are paid at once, losses must be discounted to account for the fact that standard premiums are paid up front and earn interest while waiting for claims to be paid. Under the old rules, discounting was already built into the factors found in the WAC tables. Under the new rules, discounting is built into the Department's loss development methodology with the anticipation that investment income will be offset by the costs of the claims. The new plan also introduced the concept of a hazard group, which is a distribution of the standard premium by risk class and is used to determine the insurance charges that will be assigned. The WFB was placed in Hazard Group 4.

Before enrollment of the new plans, all of the retrospective rating groups received a packet of information, including historical performance for that retrospective rating group from 1984 through 2008, with data elements looking at their standard premium, developed losses, retro premium, net adjustment, and corresponding loss ratio.

The Department's actuaries also developed a model, entitled "Modeling New Retro Plan Tables" for each retrospective rating group. The model was based on each retrospective rating group's past three years of performance. It was developed as an educational tool to illustrate what the result would be for the retrospective rating group if the new rules had been in effect from 2006 through 2008, using plan choices that approximated choices the retrospective rating group had made under the old plan. Based on the model developed for the WFB, with all other things being equal, the WFB would continue to receive refunds, although the refunds would be about 3 percent less than the previous years.

In 2010, many retro groups expressed confusion about the impending rule changes. Department personnel met with retro groups across the state to help them understand the new plan choices. Diane Doherty, the Department's retro program manager at the time, and her staff held approximately 40 meetings with retrospective rating groups prior to the adoption of the new rules. The Department provided each group with an online retro premium "calculator" (a downloadable web-based Excel workbook) to illustrate the results of their old plan choices under the new rules.

Diane Doherty, Diana Finch, the Department's financial incentive coordinator, and Bill Vasek, the Department's senior actuary, personally met with Linda Harvey, the WFB's retro program manager, Patrick Batts, the WFB's CEO, and Sonya Bachlmayr, the WFB's CFO on more than one occasion. At one of these meetings, Mr. Vasek, showed them the model and explained how the new rules would work using loss figures from 2006 through 2008. The model did not predict or guarantee future outcomes.

Ms. Harvey, who had ultimate responsibility for making plan choice recommendations to the WFB's management, testified repeatedly that she did not understand the new plan choices. At one meeting, she specifically asked Bill Vasek if the WFB's outcomes would be the same as in the past if they chose the options in the model. She asserted that Mr. Vasek waited a few minutes and then stated, "It's close, yes."[3] During another meeting, the WFB's CFO, Ms. Bachlmayr asked Mr. Vasek if the model was the same as the old plan B. Mr. Vasek stated, "Yeah, it's about the same. But I can't tell you to use it or not, to go with this or not."[4] Ms. Harvey, who was at that meeting, interpreted this statement to mean that Mr. Vasek could not outright tell them to use the numbers they had, but the model would work the same as the plan they had chosen previously.

After a meeting with Mr. Vasek, Ms. Harvey contacted Charles (Chuck" Van Kampen, chief actuary for the American Agricultural Insurance Company (AAIG), the WFB's reinsurer. She asked for his advice on making plan choices and she asked for a reinsurance quote. Ms. Harvey referred

[3] 9/5/17 Tr. at 76.
[4] 1/8/18 Tr. at 11.

Mr. Van Kampen to Mr. Vasek for more information. After running his own calculations and modeling, Mr. Van Kampen was concerned that the choices identified in the Department's modeling for the WFB would result in assessments. He called Mr. Vasek. According to Mr. Van Kampen, Mr. Vasek told him, that if the WFB was getting a refund before, it would get a refund under the new plan. The refund would just be smaller. Mr. Vasek did not recall the conversation this way. His recalled that his studies showed that if the plan had been in place in the past, the WSF would have gotten a refund. Thus, if the WFB had the same relative experience in the future, they would have a result that was similar.

The Department provided Mr. Van Kampen with additional information, but according to Mr. Van Kampen the information lacked detail. Believing that no additional information would be forthcoming, Mr. Van Kampen ran his own calculations and modeling. He used accepted actuarial practices and made certain inferences in order to calculate what the loss ratios would be under the new plan. After running his own calculations, he concluded that under the new rules the losses would develop at about 59 percent of how they had developed under the old rules. Based on these calculations, Mr. Van Kampen determined that the WFB would receive refunds every year, although the refunds would be smaller. On this basis, he was comfortable providing a reinsurance quote to the WFB.

For the coverage years 2011 and 2012, the WFB made the same plan choices as indicated in the Department's modeling. For the fiscal year 2011, the first adjustment was issued on April 29, 2013, for $2,640,511. The second adjustment was issued on May 5, 2014, for $1,775,462. Because the first adjustment was higher than the second adjustment, the Department returned $865,049 to the WFB. The third adjustment was issued on May 4, 2015, for $4,756,935. Thus, for the coverage year 2011, the final adjustment was an assessment of $4,756,935.[5]

For the fiscal year 2012, the first adjustment was issued on May 2, 2014 for $3,694,811. The second adjustment was issued on May 2, 2015, for $3,695,128, resulting in an additional payment by the WFB of $2,720. The third adjustment was issued on May 3, 2016, for $3,692,408. Thus, for coverage year 2012, the total assessments were $3,692,408. Total losses for 2011 and 2012 were $8,449,343.

[5] Ex. No. 4.

There is no dispute that the 2011 and 2012 assessments were unexpected and devastating for the WFB. In order to meet its obligations, the WFB laid off six employees. The CEO and CFO were replaced and Linda Harvey retired. For the coverage year 2013, the WFB changed the parameters for the minimum and maximum loss ratios. The WFB also developed a methodology to help keep track of its performance. For the fiscal year 2013, the WFB received a total refund of $3,220,056.

The WFB does not contend that the Department calculated the assessments incorrectly, or that its assessments were contrary to the statutes and rules that govern the calculation of retrospective rating group premiums. Rather, the WFB contends that the Department recommended the wrong plan choices and that it reasonably relied on the Department's recommendations to its detriment.[6] Specifically, the WFB contends that the Department represented it would receive refunds approximately the same as it had in past years if it followed the Department's recommendations.[7] The WFB followed the Department's recommendations and instead of receiving refunds, received significant assessments.

For its part, the Department contends that the WFB had assessments for the coverage years 2011 and 2012 because the WFB failed to control its losses. According to the Department, from 2009 through 2013, the WFB experienced above-average and increasing numbers of claims, undeveloped losses, developed losses, and retro premiums relative to all other retro groups. The Department also contends that the WFB performed poorly relative to all other retrospective rating groups with respect to developed and undeveloped losses, developed and undeveloped loss ratios, premium ratios, number of claims, and percent of average final developed losses. Finally, the Department denies that it induced the WFB to make the plan choices that it did and that it never guaranteed specific outcomes under the new plans.

Equitable Estoppel

Our industrial appeals judge found that the WFB satisfied each of the five prongs for equitable estoppel:

> (1) a statement or act made by a first party that is inconsistent with a claim that the first party later asserts; (2) an act by another party in reasonable reliance on the first party's statement or act; and (3) an injury that would result to the relying party if the first party is not prevented (or "estopped") from contradicting or repudiating the first party's prior statement or act; (4) estoppel is necessary to prevent a manifest injustice;

[6] Farm Bureau PFR, pg. 2.
[7] Farm Bureau PFR, pg. 6.

and (5) estoppel will not impair governmental functions.[8] The party asserting estoppel must prove all elements by clear, cogent, and convincing evidence.[9]

In reaching her determination, our industrial appeals judge found the testimony of Linda Harvey and Chuck Van Kampen credible, particularly in their testimony that Bill Vasek assured them that plan choices outlined in the Department's modeling would result in refunds. Our review of the record leads us to a different conclusion.

As a large retrospective rating group, WFB had to appreciate that past performance does not predict future returns, especially under a new plan that is substantially different and more complex than the old plan. WFB also had to appreciate that it had a higher number of claims, and that its claims costs increased in 2011 and 2012. This was credibly demonstrated by both Diane Doherty and Bill Vasek. As a retrospective rating group, WSF's business involves the assessment of risk and an understanding that plan choice and claims costs will impact its premiums.

It is within this context that we consider the testimony of Linda Harvey who repeatedly testified that she did not understand the new plan. She sought out and relied on the advice of Chuck Van Kampen, the WFB's reinsurance actuary, who apparently did his best to assist her but he also did not entirely understand the new plan and he made certain assumptions that may not have been fully vetted. Ms. Harvey appeared to seek assurances from Mr. Van Kampen and the Department that realistically could not be given.

It is possible that the Department could have taken additional steps to emphasize that its educational model was not a guarantee of future performance, but the model by its nature was never meant to guarantee future performance. Rather, the Department merely attempted to illustrate, through the use of educational tools, what the result would be for the retro group if the new rules had been in effect from 2006 through 2008, using plan choices that approximated choices the retro group had made under the old plan. We find no evidence to suggest that the Department's communications were misleading, and to the extent there were any misunderstandings, the Department was in no better position than the WFB to resolve those misunderstandings. To the extent WFB expected a certain outcome based on the Department's representations, such an expectation was not reasonable.

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[8] *Saunders v. Lloyds of London*, 113 Wn.2d 330, 340 (1989); *Kramarevcky v. Department of Social & Health Services*, 122 Wn.2d 738 (1993); *Pioneer National Title Ins. Co. v. State*, 39 Wn. App. 758, 760-61 (1985); *In re Michael W. Aldridge*, Dckt. No. 14 15601 (January 21, 2016).
[9] *Kramarevcky*.

For these reasons, we conclude that the WFB did not prove the elements for equitable estoppel by clear, cogent, and convincing evidence. Because we find no grounds for applying equitable estoppel, it is not necessary for us to inquire whether we may exercise equitable powers under the doctrine of stare decisis.[10]

DECISION

1. In Docket No. 15 23088, the Washington State Farm Bureau filed an appeal with the Board of Industrial Insurance Appeals on November 23, 2015. The retrospective rating group appeals a Department order dated November 16, 2015. In this order, the Department affirmed its prior order dated August 19, 2015, with respect to the July 2012 coverage year of Group 81. The August 19, 2015 order corrected and superseded an order dated May 4, 2015, with respect to the July 2012 coverage year, granting relief on Claims AU-04786 and AT-24154. The May 4, 2015 order was the second adjustment for the July 2012 coverage year for Group 81. This order is correct and is **AFFIRMED**.

2. In Docket No. 15 23089, the Washington State Farm Bureau filed an appeal with the Board of Industrial Insurance Appeals on November 23, 2015. The retrospective rating group appeals a Department order dated November 17, 2015. In this order, the Department affirmed its prior order dated August 18, 2015, which affirmed an order dated May 4, 2015, with respect to the July 2011 coverage year for Group 81. The May 4, 2015 order was the third adjustment for the July 2011 coverage year for Group 81. This order is correct and is **AFFIRMED**.

3. In Docket No. 16 21884, the Washington State Farm Bureau filed an appeal with the Board of Industrial Insurance Appeals on November 10, 2016. The retrospective rating group appeals a Department order dated October 26, 2016. In this order, the Department affirmed a prior order dated May 3, 2016, for the July 2012 coverage year for Group 81. The May 3, 2016 order was the third adjustment for the July 2012 coverage year for Group 81. This order is correct and is **AFFIRMED**.

4. In Docket No. 18 20654, the Washington State Farm Bureau filed an appeal with the Board of Industrial Insurance Appeals on June 18, 2018. The retrospective rating group appeals a Department order dated August 18, 2015. In this order, the Department corrected and superseded its prior order dated May 4, 2015, granting relief on Claim No. AR-36687 with respect to the July 2011 coverage

[10] *In re Mary Kiele*, Dckt. No. 05 16144 (July 5, 2006).

year for Group 10670. The May 4, 2015 order was a rate notice containing the third adjustment for the July 2011 coverage year. This order is correct and is **AFFIRMED**.

FINDINGS OF FACT

1. On March 2, 2016, December 9, 2016, and July 20, 2018, an industrial appeals judge certified that the parties agreed to include the Jurisdictional Histories in the Board record solely for jurisdictional purposes.

2. Since 1984, the Washington State Farm Bureau ("WFB") has been a sponsor of Retrospective Rating Group 81. From 2007 to 2012, the WFB also sponsored Retrospective Rating Group 10670.

3. For coverage years 1991 through 2010 (July 1, 1991 – June 30, 2011), the WFB selected a loss-based plan with a maximum premium ratio of 1.1 (also known as Plan B 1.1). During this period, WFB's Group 81 received refunds every year; while Group 10670 received refunds for coverage years 2007 and 2008, and received assessments for coverage years 2009 and 2010.

4. In 2010, the Department adopted new rules (WAC 296-17B and what follows) governing the retrospective rating program, effective for coverage years beginning in 2011. The new retrospective rating plans were more consistent with current industry standards. They were more complex, with greater options than the old plans.

5. In 2010, Department personnel met with WFB management on five or six occasions to explain the plan choices offered under the new rules. The Department provided retrospective rating groups, including the WFB, with a model spreadsheet that illustrated what the result would have been for the retrospective rating group if the new rules had been in effect from 2006 through 2008, using plan choices that approximated choices the retrospective rating group had made under the old plan.

6. The modeling for the WFB reflected the following plan choices: a loss-based plan with a single loss limit of $500,000, maximum loss ratio of 76.5 percent (equivalent to risking 10 percent of the standard premium), and a minimum loss ratio of 0 percent. Under the Department's modeling, with all other things being equal, WFB Group 81 would have received refunds of $4.91 million for coverage year 2006, $2.88 million for coverage year 2007, and $7.57 million for coverage year 2008; WSB Group 10670 would have received refunds of $172,000 for coverage year 2007, and $1.48 million for coverage year 2008.

7. The WFB made the following plan choices for coverage years 2011 and 2012: a loss-based plan with a single loss limit of $500,000, a maximum loss ratio of 76.5 percent (equivalent to risking 10 percent of the standard premium), and a minimum loss ratio of 0 percent.

8. For the fiscal year 2011, the first adjustment was issued on April 29, 2013, for $2,640,511. The second adjustment was issued on May 5, 2014 for $1,775,462. Because the first adjustment was higher than the second adjustment, the Department returned $865,049 to the WFB. The third adjustment was issued on May 4, 2015 for $4,756,935. Thus, for the coverage year 2011, the final adjustment was an assessment of $4,756,935.

9. For the fiscal year 2012, the first adjustment was issued on May 2, 2014, for $3,694,811. The second adjustment was issued on May 2, 2015, for $3,695,128, resulting in an additional payment by the WFB of $2,720. The third adjustment was issued on May 3, 2016, for $3,692,408. Thus, for coverage year 2012, the total assessments were $3,692,408. Total losses for 2011 and 2012 were $8,449,343.

10. The WFB did not reasonably rely on any recommendation, representation, admission, or statement by Department personnel when WFB made retrospective rating plan choices for coverage years 2011 and 2012.

11. There is no reported appellate case in Washington with analogous facts to the instant case in which the court exercised its equitable powers.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. The Department of Labor and Industries is not equitably estopped from assessing premiums against WFB, calculated in accordance with the WFB's plan choices for coverage years 2011 and 2012.

3. The doctrine of stare decisis does not apply in this matter to allow the Board to apply equitable estoppel.

4. The Department orders dated November 16, 2015, November 17, 2015, October 26, 2016, and August 18, 2015, are affirmed.

Dated: December 7, 2018.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

FRANK E. FENNERTY, JR., Member

Addendum to Decision and Order
In re Washington State Farm Bureau
Docket Nos. 15 23088, 15 23089, 16 21884 & 18 20654
Firm Nos. 00081 & 10670

Appearances

Retrospective Rating Group, Washington State Farm Bureau #00081, #10670, by

Holmes Weddle & Barcott PC, per Ann M. Silvernale

Department of Labor and Industries, by the Office of the Attorney General, per James S. Johnson and Katy J. Dixon

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department and retrospective rating group filed timely Petitions for Review of a Proposed Decision and Order issued on July 30, 2018, in which the industrial appeals judge affirmed the orders of the Department dated November 16, 2015, November 17, 2015, October 26, 2016, and August 18, 2015. The Department also filed a response to the retrospective rating group's Petition for Review.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.