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TREASURER AND
INSURANCE COMMISSIONER
Initiated by: *CR*



AP

THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

TOM GALLAGHER

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DIVISION OF
ADMINISTRATIVE
HEARINGS

IN THE MATTER OF:

JOHN DEERE INSURANCE COMPANY

DOI CASE NO: 26537-98-CO
DOAH CASE NO.: 01-3015

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FINAL ORDER

THIS CAUSE came on for consideration and final agency action. On January 12, 1999, the Respondent Department of Insurance issued a Notice of Excessive Profits finding that Petitioner John Deere Insurance Company (John Deere) had realized excess profits in the amount of \$191,094.00 for workers' compensation business covering the calendar/accident years 1994, 1995, and 1996. Petitioner timely filed a request for a proceeding pursuant to section 120.57(1), Florida Statutes. Pursuant to notice, the matter was heard before Harry L. Hooper, Administrative Law Judge, Division of Administrative Hearings, on October 2, 2001.

After consideration of the record and argument presented at hearing, the Administrative Law Judge issued his Recommended Order on October 30, 2001. (Attached as Exhibit A). The Administrative Law Judge recommended that a Final Order be entered finding that Petitioner realized excess profits in the amount of \$191,094.00 for workers' compensation business covering the calendar/accident years 1994, 1995, and 1996.

On November 14, 2001, the Petitioner timely filed exceptions to the Recommended Order. Petitioner offers several exceptions to the findings of fact and conclusions of law in the Recommended Order. Petitioner's exceptions are addressed below.

On November 14, 2001, the Respondent's timely filed exceptions to the Recommended Order. Respondent offers several exceptions to the findings of fact and conclusions of law in the Recommended Order. The Respondent's exceptions are addressed below.

RULINGS ON RESPONDENT'S EXCEPTIONS

1. Respondent's first exception is to the findings of fact in paragraph 8 of the Recommended Order. Respondent asserts that "paragraph 8 implies that Section 627.215, Florida Statutes, did not require calculation of excessive workers' compensation profits for 1987, 1988, and 1989 (the three-year compilation period reported to the Department prior to July 1, 1991)." Respondent's Exceptions to Recommended Order, paragraph 10. Although the Respondent does not specify which particular finding in this paragraph makes the offending implication, the Department interprets Respondent's exception as pertaining to the final sentence of paragraph 8 of the Recommended Order, which reads "During the three year period leading to 1991, data was reported, but no excess profits were required to be calculated." Petitioner has raised the same concern in its second exception.

Respondent correctly asserts that section 627.215, Florida Statutes, required the calculation of excess workers' compensation profits for the calendar years 1987, 1988, and 1989. Section 627.215, Florida Statutes, has required the calculation of excess

profits for workers' compensation since its enactment in 1979. See, Laws of Florida 1979, Chapter 79-40. Section 104. When paragraph 8 is read in context with the recital of the history of section 627.215 in paragraph 7, it is clear that the Administrative Law Judge also agreed that the calculation of excess workers' compensation profits was required for the calendar years 1987, 1988, and 1989. When read in context, it is also evident that the reference in the last sentence of paragraph 8 to the absence of a requirement for the calculation of excess profits was a reference to the calculation of excess commercial property and commercial casualty profits for the years 1987, 1988, and 1989. The calculation of excess profits for commercial property and commercial casualty was not required for those years. See Laws of Florida 1988, Chapter 88-390, Section 3 and Section 627.215(1)(b), and Florida Statutes (Supp. 1988). However, because both parties have raised the same concern, and to avoid further confusion, Respondent's exception is granted and the last sentence of paragraph 8 of the Recommended Order is modified to read: "During the three year period leading to 1991, data was reported, but no excess profits were required to be calculated for commercial property and commercial casualty insurance."

2. Respondent's second exception is to all references in the Recommended Order to Sentry Select Insurance Company (Sentry) relating to events occurring before Sentry's acquisition of John Deere in October 1999. Respondent's Exceptions to Recommended Order, paragraph 11.

The record reflects that Sentry acquired John Deere in October, 1999 and renamed the company Sentry Select Insurance Company. See Petitioner's Exhibit 3, Telephonic Deposition of Patricia Ferguson, page 8, line 20 through page 9, line 2.

This history is acknowledged by the first sentence of the Preliminary Statement and paragraph 1 of the Recommended Order. Sentry, as John Deere's successor in interest, is responsible for the excess profits incurred by John Deere. However, it is more accurate and consistent with the record to substitute "John Deere Insurance Company" for "Sentry" when referring to the occurrences described in the Findings of Fact and Conclusions of Law arising before the October 1999 acquisition. Accordingly, Respondent's exception is granted, and the Recommended Order is modified to substitute "John Deere" for "Sentry" when referring to the occurrences arising before the October 1999 acquisition.

3. Respondent's third exception is to the conclusion of law in paragraph 21 of the Recommended Order. Respondent's asserts: "In paragraph 21, DOAH alludes to the date upon which losses and loss adjustment expenses are valued under Section 627.215, Florida Statutes. This point should be more clearly articulated in the Final Order, as it has great significance relative to the Department's construction of Section 627.215(14), Florida Statutes." Respondent's Exceptions to Recommended Order, paragraph 13. Respondent then argues in support of its exception and concludes with a request to modify paragraph 21 to read consistent with the reasons presented. Respondent's Exceptions to Recommended Order, paragraphs 14, 15, 16, and 17.

Respondent's exception does not disagree with the legal conclusions made in paragraph 21. Respondent's arguments in support of its exception are consistent with the Recommended Order's legal conclusions. Moreover, the Recommended Order's conclusions of law, not just the conclusions in paragraph 21, are consistent with the reasoning presented in Respondent's exception. Respondent's exception does not

explain why the language in paragraph 21 is insufficient. Nor does Respondent's exception offer any substitute, clearer, or better articulated language for consideration.

It is significant that paragraph 21 of the Recommended Order addresses "the reports" filed by Sentry. The Conclusion of the Administrative Law Judge recognizes that, with respect to the property and casualty experience data submitted on May 26, 1999, consideration of this report in the excess profits calculation would necessarily involve the application of the law to property and casualty insurance subsequent to December 31, 1996, which would be contrary to the dictates of section 627.215.

Paragraph 21 sufficiently and accurately articulates the correct construction of section 627.215(14), Florida Statutes, by concluding that, effective January 1, 1997, commercial property and commercial casualty insurance were taken out of the excess profits equation. Paragraph 21 correctly applies the law to bar the consideration of commercial property and commercial casualty insurance from the excess profits equation for workers compensation underwriting profits and losses valued as of December 31, 1997, for the years 1994, 1995, 1996. Furthermore, consistent with Respondent's argument, paragraph 22 of the Recommended Order accurately concludes that it would be unlawful for the Department to consider commercial property and commercial casualty experience in the calculation of Petitioner's workers' compensation excess profits in this instance.

Because paragraph 21 sufficiently and accurately articulates the correct construction of section 627.215(14), Florida Statutes, Respondent's exception is rejected.

RULINGS ON PETITIONER'S EXCEPTIONS

1. Petitioner's first exception is with the finding of fact in paragraph 6 of the Recommended Order that the material provided by the Petitioner to the Department on or about May 26, 1999, Petitioner's Exhibit 3A, was insufficient to determine that the combined commercial property, commercial casualty and workers' compensation experience data would not have realized excess profits for the years 1994, 1995, and 1996. The Petitioner asserts that the material provided was sufficient to make the determination.

The agency's authority to reject or modify findings of fact is limited by the provision in section 120.57(1)(l), Florida Statutes, which provides that "the agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

The Recommended Order did not provide an explanation for the finding that the material provided by the Petitioner to the Department on or about May 26, 1999, was insufficient. However, the Administrative Law Judge evaluated the evidence and determined that the provided material was insufficient to reach such a conclusion. There is competent substantial evidence in the record to support this finding. Adoption of Petitioner's exception would improperly require that the Department reweigh the evidence. The Department cannot reweigh the evidence. The weight given to the evidence is the province of the Administrative Law Judge and cannot be disturbed by the agency unless the finding is not supported by competent substantial evidence. Brogan v. Carter, (Fla. 1st DCA 1996). Accordingly, Petitioner's exception is rejected.

2. Petitioner's second exception is with paragraph 8 of the Recommended Order. The Petitioner's exception does not specify to which particular finding of fact it is taking exception. In support of its exception the Petitioner only states, "For the period from 1988-1991, excess profits were required to be calculated for workers compensation insurance written in Florida." Petitioner's Exceptions to Recommended Order, paragraph 8. The Department interprets the Petitioner's concern as being the same concern that is addressed by Respondent's first exception, which prompts the modification of paragraph 8. See Ruling on Respondent's Second Exception, *supra*. Accordingly Petitioner's exception is granted and the last sentence of paragraph 8 is modified as provided in the ruling on Respondent's second exception.

3. Petitioner's third exception is with paragraph 11 of the Recommended Order. The Petitioner's exception does not specify to which particular aspect of this finding of fact it is taking exception. In support of its exception the Petitioner only states, "Form F was certified as a full and true statement of the Company's workers compensation experience for the years reported." Petitioner's Exceptions to Recommended Order, paragraph 11. Petitioner's exception is vague. It is not clear from Petitioner's exception whether it is arguing for the modification or the rejection of this finding of fact. Petitioner's exception does not appear to disagree with the finding of fact. Moreover, there is competent substantial evidence in the record to support the finding of fact in paragraph 11 of the Recommended Order. See Respondent's Exhibit 1, Page 1 of 16. Accordingly, Petitioner's exception is rejected.

4. Petitioner's fourth exception is with the finding of fact in paragraph 12 of the Recommended Order that the Department correctly determined the amount of

excess profit to be \$191,094.00. In support of this exception the Petitioner argues that the excess profits assessment was incorrect because the Department refused to consider the company's commercial property and casualty experience.

The finding of fact in paragraph 12 is consistent with the conclusions of law in the Recommended Order and the conclusions of law adopted by this Final Order. This factual finding is based on the correct construction and application of section 627.215(14), Florida Statutes. The conclusions of law of the Recommended Order correctly determined that section 627.215(14) did not permit the Department to lawfully consider the Petitioner's commercial property and casualty experience when calculating its workers' compensation excess profits for the years 1994, 1995, and 1996. See Recommended Order, paragraph 22, and Ruling on Respondent's Third Exception. Accordingly, Petitioner's exception is rejected.

5. Petitioner's fifth exception is with the finding of fact in paragraph 13 of the Recommended Order that the Department correctly declined to consider the commercial property and casualty experience submitted by Petitioner.

The decision to decline consideration of the commercial property and casualty experience submitted by Petitioner was consistent with the construction of section 627.215(14), Florida Statutes, as made by the conclusions of law in the Recommended Order, and as adopted by this Final Order. Accordingly, Petitioner's exception is rejected.

6. Petitioner's sixth exception is with the conclusion of law in paragraph 20 of the Recommended Order that Rule 4-189.007, Florida Administrative Code, governs the assessment of excess profits in this matter. Petitioner's exception reads, "Rule 4-

189.007 is a rule applicable to the assessment of excess profits in the case of Sentry. It does not govern the assessment. The provisions of Section 627.215, Florida Statutes, govern the assessment.” Petitioner’s Exceptions to Recommended Order, paragraph 20. The Recommended Order correctly concludes that Rule 4-189.007 “is the rule which governs the assessment of excess profits in the case of [Petitioner].” This conclusion of law does not mean, as Petitioner’s exception appears to imply, that the rule is the only legal requirement applicable to the assessment of excess profits for workers’ compensation insurance. Rule 4-4-189.007 is the applicable rule and section 627.215 is the applicable statute. Accordingly, Petitioner’s exception is rejected.

7. Petitioner’s seventh exception is with the conclusion of law in paragraph 21 of the Recommended Order that section 627.215(14), Florida Statutes, takes commercial property and commercial casualty insurance out of the excess profits equation. Petitioner asserts that commercial property and commercial casualty insurance must be factored into the excess profits equation because the calculation relates to calendar/accident years before January 1, 1997, the effective date of section 627.215(14), Florida Statutes.

Paragraph 21 correctly construes section 627.215(14), Florida Statutes, by concluding that, effective January 1, 1997, commercial property and commercial casualty insurance were taken out of the excess profits equation. Paragraph 21 correctly applies the law to bar the consideration of commercial property and commercial casualty insurance from the excess profits equation for workers compensation underwriting profits and losses valued on December 31, 1997, for the years 1994, 1995, 1996. Paragraph 21 correctly concludes that section 627.215,

Florida Statutes, was properly applied to Petitioner's excess profits calculation in this instance where, in accordance with the statute, losses were valued and the calculation was performed subsequent to December 31, 1996. Accordingly, Petitioner's exception is rejected.

8. Petitioner's eighth exception is with the conclusion of law in paragraph 22 of the Recommended Order. The Recommended Order concludes that, because section 626.215(14) was applied after January 1, 1997, it was unlawful for the Department to consider commercial property and commercial casualty insurance profits or losses in the calculation of Petitioner's workers' compensation excess profits.

Consistent with the ruling on Petitioner's seventh exception, paragraph 22 of the Recommended Order accurately concludes that it would be unlawful for the Department to consider commercial property and commercial casualty insurance underwriting profits or losses in the calculation of Petitioner's workers' compensation excess profits for calendar/accident years 1994, 1995, and 1996. Accordingly, Petitioner's exception is rejected.

In the factual context of this case, section 627.215, Florida Statutes, required John Deere to submit, by no later than July 1, 1998, relevant data as to workers' compensation coverage for calendar years 1994, 1995, and 1996 valued as of December 31, 1997. In accordance with the statute, John Deere, submitted the required report for the calendar years in question on or about June 24, 1998.

The pivotal issue presented in this case is the interpretation of Section 15 of Chapter 95-276, Laws of Florida, which became law on June 14, 1995, and which created subsection (14) of section 627.215, Florida Statutes, which provides: "The

application of this law to commercial property and commercial casualty insurance ... ceases on January 1, 1997." The Administrative Law Judge in paragraphs 21 and 22 of the Conclusions of Law properly interpreted this statutory language to prohibit the consideration of John Deere's property and casualty experience in the excess profits calculation, which was conducted in 1998 and was based upon the insurer's experience for the years 1994, 1995, and 1996 valued as of December 31, 1997, since any such consideration would have involved the application of the law to commercial property and commercial casualty insurance after December 31, 1996, in contravention of the statute.

As to insurers writing both workers' compensation insurance and commercial property and casualty insurance, section 627.215(7)(a) required, beginning with the report due on or before July 1, 1991, that the insurer's experience in these lines of business be combined in order to determine whether excess profits had been realized. However, due to the enactment of section 627.215(14), the provisions of section 627.215(7)(a), were, as to property and casualty insurance, rendered inapplicable to the 1994 –1996 three year reporting period because the application of the statute to these years would have necessitated the valuation of losses and loss adjustment expenses as of December 31, 1997, the filing of a report, and the determination as to the existence of excess profits on or after January 1, 1997, contrary to section 627.215(14), Florida Statutes.

Upon careful consideration of the record, the submissions of the parties, and being otherwise fully advised in the premises, it is ORDERED:

1. As concluded in the ruling on Respondent's first exception and Petitioner's second exception, the last sentence of paragraph 8 of the Findings of Fact is modified to read: "During the three year period leading to 1991, data was reported, but no excess profits were required to be calculated for commercial property and commercial casualty insurance." As concluded in ruling on Respondent's second exception the Findings of Fact are modified to substitute "John Deere Insurance Company" for "Sentry" when referring to the occurrences arising before October 1999. The Findings of Fact of the Administrative Law Judge, as modified herein, are adopted in full as the Department's Findings of Fact.

2. As concluded in ruling on Respondent's second exception, the Conclusions of Law are modified to substitute "John Deere Insurance Company" for "Sentry" when referring to the occurrences arising before October 1999. The Conclusions of Law of the Administrative Law Judge, as modified herein, are adopted in full as the Department's Conclusions of Law.

3. Consistent with the ruling on Respondent's second exception, the Administrative Law Judge's recommendation is modified to substitute "John Deere Insurance Company, now known as Sentry Select Insurance Company" for Sentry. The Administrative Law Judge's recommendation, as modified herein, that a Final Order be entered which finds that John Deere Insurance Company, now known as Sentry Select Insurance Company, realized \$191,094.00 in excess profits for workers' compensation business covering the calendar/accident years 1994, 1995, and 1996 is approved and accepted as being the appropriate disposition.

ACCORDINGLY,

1. John Deere Insurance Company, now known as Sentry Select Insurance Company, realized \$191,094.00 in excess profits for workers' compensation business covering the calendar/accident years 1994, 1995, and 1996.

2. John Deere Insurance Company, now known as Sentry Select Insurance Company, shall provide refunds or policy renewal credits in the amount of \$191,094.00 for calendar/accident years 1994, 1995, and 1996 to policyholders in the manner prescribed by section 627.215, Florida Statutes, within sixty (60) days of this Final Order and as otherwise provided in section 627.215, Florida Statutes.

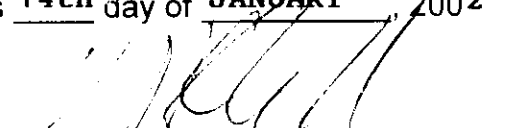
3. John Deere Insurance Company, now known as Sentry Select Insurance Company, shall attempt to locate policyholders whose refund checks are returned and shall thereafter report any unclaimed excessive profits as unclaimed or abandoned property, pursuant to the provisions of Chapter 717, Florida Statutes.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of the Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or Notice of Appeal with the General Counsel, acting as the agency clerk, at 200 East Gaines Street, Tallahassee, FL 32399-0333, and a copy of the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

DONE and ORDERED this 14th day of JANUARY, 2002




Kevin McCarty
Deputy Insurance Commissioner

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