OFFICE OF INSURANCE REGULATION

KEVIN M. MCCARTY
COMMISSIONER

IN THE MATTER OF:

Case No. 90931-07

FIRST AMERICAN TITLE
INSURANCE COMPANY
_____/

FINAL ORDER

THIS CAUSE came on before the undersigned, for consideration and final agency action.

On June 24, 2005, First American Title Insurance Company (FIRST AMERICAN) made a Form Filing with the Office of Insurance Regulation (OFFICE) identified as FCC 05-07521, in which FIRST AMERICAN sought the approval of five forms and 17 endorsements for use in Florida. On August 24, 2006, the OFFICE issued a letter disapproving filing FCC 05-07521. On October 23, 2006, FIRST AMERICAN filed its First Amended Petition for a Section 120.57(1), Florida Statutes, Formal Administrative Hearing. On March 30, 2007, FIRST AMERICAN filed Petitioner's Prehearing Statement, in which it indicated it was only challenging OFFICE denial of the Eagle 9® UCC Insurance Policy for Lenders and the associated endorsements. The matter was heard before the Honorable Robert S. Cohen, Administrative Law Judge, on April 4, 2007, in Tallahassee, Florida.

After consideration of the evidence, argument, and testimony presented at hearing, the Administrative Law Judge (ALJ) issued his Recommended Order on July 3, 2007. (Attached hereto as Exhibit "A"). The ALJ recommended that a Final Order be entered disapproving the Eagle 9® UCC Insurance Policy for Lenders and the associated endorsements.

Petitioner, FIRST AMERICAN filed exceptions to the ALJ's Recommended Order on July 18, 2007. Based upon a complete review of the record, the Recommended Order and the exceptions and the relevant statutes, rules, and case law, I find as follows:

RULINGS ON THE PETITIONER'S EXCEPTIONS

Section 120.57(1)(l), Florida Statutes, sets forth the standard an agency must use when reviewing the Recommend Order of an administrative law judge.

Section 120.57(1)(l) in part provides:

> (l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. 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.

EXCEPTIONS TO FINDINGS OF FACT

1. Petitioner excepts to paragraph 12 of the ALJ's findings of fact. This finding of fact is clear on its face. The policy form does not contain the term "existence" and this was admitted on the record. Although Petitioner maintains that the evidence demonstrates the policy does cover existence through use of the term "attachment", the Petitioner's own witness Mr. Prendergast

specifically indicated that the term existence had no meaning and it would be imprudent to use that term in the policy. (TR.1 p. 46 lines 13-20). The ALJ is allowed latitude to make factual findings and make reasonable inferences that flow therefrom. The law is well established that an agency is bound to honor a hearing officer's [now ALJ's] findings of fact unless they are not supported by competent, substantial evidence. McDonald v. Department of Banking & Fin., 346 So.2d569, 578 (Fla. 1st DCA 1977). It is the hearing officer's function to consider all the evidence, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence; the agency is not authorized to perform these functions or otherwise interpret the evidence to fit its desired ultimate conclusion. Heifetz v. Department of Business Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Accord Wash & Dry Vending Co. v. Department of Business Reg., 429 So.2d 790, 792 (Fla. 3d DCA 1983) (agency may not substitute its judgment for that of the hearing officer by taking a different view of or placing greater weight on the same evidence).

Accordingly, this exception is rejected.

2. Petitioner excepts to paragraph 15 of the ALJ's findings of fact. The record clearly reflects that the referenced policies did not provide coverage for the existence of a security interest (See Respondent's Exhibit 1). The Petitioner is relying on assumptions and inferences that were obviously rejected by the ALJ. This particular exception constitutes reargument of issues raised at the final hearing that were rejected by the ALJ as not persuasive. The fact that some of the Petitioner's policies, although withdrawn, do specifically use the term "existence", when the EAGLE 9 ® Insurance Policy for Lenders does not, constitutes competent substantial evidence in the record to support this finding, as well as the testimony of witnesses for the OFFICE.

Accordingly, this exception is rejected.

3. Petitioner excepts to paragraph 16 of the ALJ's findings of fact. The ALJ has made a finding that if the term "existence" appeared in the insuring agreement then the policy would have met the statutory requirement for approval. This is clear based on the requirements of section 627.7845, F.S. The policy terminology is the best evidence of what is covered under the policy. It is evident that the ALJ rejected as not competent the testimony of the Petitioner that the policy covered existence when it did not specifically state that in the policy.

Accordingly, this exception is rejected.

4. Petitioner excepts to paragraph 22 of the ALJ's findings of fact. The referenced portion of the transcript does not clearly and unequivally prove that a search is required. The witness further described a situation in which a search may not be performed. It is the function of the ALJ to determine the credibility of the witness and it is evident from this finding that the ALJ was not convinced that a search would be required. Further there is competent substantial evidence in the record at TR. pp 80-1, 85-6 to support this finding.

Accordingly, this exception is rejected.

5. Petitioner excepts to paragraph 21 of the ALJ's findings of fact. This is related to the exception in 4. above. For the reasons set forth in 4. above the ALJ's finding is supported by competent substantial evidence in the record. The actual finding states that the Office concluded that such coverage does not require a search.

Accordingly, this exception is rejected.

6. Petitioner excepts to paragraph 30 of the ALJ's findings of fact. The Petitioner is taking the record testimony out of context. A review of the testimony from TR. pp. 138 to 140 discusses various methods of how a security interest is created. Specifically the record at TR. p.

138, lines 14-25, references a security agreement that creates rights. Again it is the function of the ALJ to review the evidence and draw reasonable inferences and conclusions therefrom. There is competent and substantial evidence in the record to support the ALJ's finding.

Accordingly, this exception is rejected.

7. Petitioner excepts to paragraph 35 of the ALJ's findings of fact. This finding does not suggest anything. The Petitioner has not specifically stated how this finding is not supported by the record. The referenced record citation specifically supports this finding. Petitioner appears to claim that the finding does not go far enough to address all possibilities. However, the finding does not state that it is the exclusive manner of perfecting a security interest.

Accordingly, this exception is rejected.

8. Petitioner excepts to paragraph 40 of the ALJ's findings of fact. The Petitioner attempts to dispute the finding as unsupported by the record. However, the cited record evidence fully supports the ALJ's finding. The reasonable inferences from this testimony supports this finding. Further, the Petitioner fails to demonstrate the significance of this finding.

Accordingly, this exception is rejected.

9. Petitioner excepts to paragraph 48 of the ALJ's findings of fact. A reasonable reading of Mr. Prendergast's testimony supports the finding of the ALJ. The finding is not rendered incorrect because it does not include all of the other testimony given by a witness. There is competent substantial evidence in the record to support the ALJ's finding.

Accordingly, this exception is rejected.

10. Petitioner's excepts to paragraph 49 of the ALJ's findings of fact. Essentially, Petitioner is rearguing the manner in which a security interest is created. The finding is specifically limited to what the UCC provides by definition. Whether a witness agrees or

disagrees with this definition is not relevant to this finding. The evidence presented as a whole, not out of context, supports the ALJ's finding.

Accordingly, this exception is rejected.

11. Petitioner excepts to paragraph 50 of the ALJ's findings of fact. There is ample testimony in the record that supports the ALJ's summarization of what assertions the Respondents made at the hearing. See Respondents Prehearing Statement and testimony of Peter Rice and Steve Parton.

Accordingly, this exception is rejected.

12. Petitioner excepts to paragraph 51 of the ALJ's findings of fact. Petitioner admittedly does not disagree with this finding. There does not appear to be a conflict between this finding and the ALJ's finding that the term "existence" does not appear in the policy. There is competent substantial evidence in the record to support both findings.

Accordingly, this exception is rejected.

13. Petitioner excepts to paragraph 55 of the ALJ's findings of fact. This is not an exception to the ultimate finding of fact, but an objection to the testimony of Mr. Parton. Mr. Parton did testify as to his knowledge and understanding of the statutory provision and his testimony is competent and substantial. This case does not involve the agency head testifying on factual issues that cut to the very heart of the controversy. The ALJ was basically stating that the Office has interpreted the statute to mean that a valid UCC title insurance policy must address the four distinct elements in the statute, namely, "existence", "attachment", "perfection" and "priority". Ultimately, the ALJ was required to draw a legal conclusion as to what the statute required and the testimony of Mr. Parton assisted the ALJ in making his conclusion. There is nothing to suggest that Mr. Parton has or will have to review the competency of his own

evidence. Further, Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So2d 322 (Fla. 1990) involved a disciplinary matter. This case does not involve disciplinary action that implicates issues of due process. Finally, the ALJ has independently reviewed the testimony of Mr. Parton and has found that it supports the legislative intent of the statute.

Accordingly, this exception is rejected.

EXCEPTIONS TO CONCLUSIONS OF LAW

14. Petitioner excepts to paragraph 61 of the ALJ's conclusions of law. The standard for review of a conclusion of law is set forth in Section 120.57(1)(l) in part as follows:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejection or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

An agency's interpretation of the statute it is charged with enforcing is afforded great deference. Florida Hospital v. Agency for Health Care Administration, 823 So2d 844 (Fla. 1st DCA 2002). The ALJ has correctly interpreted the statute. For the reasons set forth in the response to exception 1 and the response to exception 13. this exception is rejected. There is nothing in this conclusion of law which requires the Petitioner to insure invalid or unenforceable security interests.

Accordingly, this exception is rejected.

15. Petitioner excepts to paragraph 62 of the ALJ's conclusions of law. This conclusion of law is a reasonable and valid construction of the facts determined by the ALJ and the proper

application of the referenced statute. This is a cumulative exception which has been addressed in the prior exceptions claiming that the policy does specifically insure for the "existence" of a security interest. This issue has been addressed in prior responses to the exceptions. The Petitioner has failed to prove by the greater weight of the evidence that "existence" is covered under its policy.

Accordingly, this exception is rejected.

16. Petitioner excepts to paragraph 66 of the ALJ's conclusions of law. The Petitioner has failed to make a compelling argument that the ALJ should ignore the clear statutory directive that the policy must insure for the existence of a security interest. For the aforementioned reasons, this exception is rejected.

17. Petitioner excepts to paragraph 67 of the ALJ's conclusions of law. Petitioner's objection to the testimony of Mr. Parton is rejected for the reasons set forth in the response in exception 8. It does appear that there was a scriveners error in the reference to the distinction between "existence" and "attachment" that was discussed in this conclusion of law, which was attributable to the Office.

Accordingly, the last sentence of this conclusion of law is revised to delete "petitioner" and insert "respondent". This revision does not affect the meaning of this conclusion of law.

18. Petitioner excepts to paragraph 68 of the ALJ's conclusions of law. The ALJ's analysis of the relevant UCC provisions and statutes is well reasoned and implements the clear statutory intent that "existence" and "attachment" are two distinct events which must be insured under the policy.

Accordingly, this exception is rejected.

19. Petitioner excepts to paragraph 69 of the ALJ's conclusions of law. For the reasons discussed above this exception is rejected.

20. The Petitioner excepts to paragraph 70 of the ALJ's conclusions of law. This is the same argument which was raised and rejected in prior exceptions to the findings of fact and conclusions of law. The ALJ's conclusion is reasonable and logical. The fact that the other policies did specifically include the term "existence", is persuasive that the subject policy which did not include the term "existence" did not insure for the "existence" of a security interest.

Accordingly, this exception is rejected.

21. Petitioner excepts to paragraph 71 of the ALJ's conclusions of law. This is a conclusion of law, not a finding of fact. The conclusion is based on principles of statutory construction and a fair analysis of the facts presented at the hearing.

Accordingly, this exception is rejected.

22. Petitioner excepts to paragraph 72 of the ALJ's conclusions of law. This exception has been repeatedly addressed throughout the responses to the exceptions. This conclusion of law clearly explicates the ALJ's reasoning, construction and application of the law to the facts as presented at the hearing, which were supported by competent and substantial evidence.

Accordingly, this exception is rejected.

23. This appears to be a "general" exception which summarizes the previous exceptions. The issue is not whether the Petitioner has cited competent substantial evidence to support its claims. The issue is whether the findings of fact made by the ALJ are supported by competent substantial evidence. As discussed in the responses to the Petitioners exceptions, there was competent substantial evidence in the record to support those findings. As previously indicated it is the ALJ's responsibility to consider all evidence, resolve conflicts,

judge credibility of witnesses, draw permissible inferences from the evidence and reach ultimate findings of fact based on competent substantial evidence. Heifetz v. Dept. of Business Regulation, 475 So2d 1277(Fla. 1st DCA 1985). This is exactly what the ALJ has done in the case at bar.

Finally, the Petitioner has objected to the disapproval of the related endorsements to the Eagle 9® Policy for Lenders. The fact remains that the endorsements contained deficiencies that justified disapproval. Additionally, the endorsements were to a policy which was disapproved on other valid grounds. Accordingly, it makes no logical sense to approve endorsements to a policy which was not approved.

IT IS THEREFORE ORDERED:

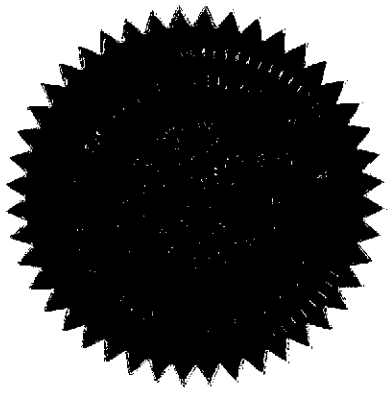
1. The Findings of Fact of the ALJ, are adopted in full as the OFFICE's Findings of Fact.

2. The Conclusions of Law of the ALJ, are adopted in full as the OFFICE's Conclusions of Law, except as provided herein.

3. The Recommendation of the ALJ is accepted.

ACCORDINGLY, FIRST AMERICAN'S Eagle 9® UCC Insurance Policy for Lenders and the associated endorsements are hereby DISAPPROVED.

DONE and ORDERED this 9th day of October, 2007.



Kevin M. McCarty, Commissioner
Office of Insurance Regulation

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a Notice of Appeal with the General Counsel, acting as Agency Clerk, 200 East Gaines Street, 612 Larson Building, Tallahassee, Florida, 32399-0333 and a copy of the same and filing fee, with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

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