

FILED

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32399-0950

2011 JAN 27 A 11: 20
DIVISION OF
ADMINISTRATIVE
HEARINGS

(850) 488-6151

JON S. WHEELER
CLERK OF THE COURT

January 26, 2011

Claudia Llado, Clerk
Division Of Admin. Hearings
1230 Apalachee Parkway
Desoto Bldg.
Tallahassee, FL 32399-3060

RE: Office of Insurance Regulation and et al. v. Service Insurance Company
Docket No: 1D09-5799
Lower Tribunal Case No.: 09-3042RX

Dear Ms. Llado:

I have been directed by the court to issue the attached mandate in the above-styled cause. It is enclosed with a certified copy of this Court's opinion.

Yours truly,

Jon S. Wheeler
Clerk of the Court

JSW/jm
Enclosures

c: (letter and mandate only)
Sharlee Hobbs Edwards
Anoush A. Brangaccio,
A.G.C.
Maria Elena Abate

S. Marc Herskovitz
Richard J. Santurri
Randon E. Loeb

Elenita Gomez, A.G.C.
Douglas A. Mang

M A N D A T E

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

From

DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

To Hon. Linda M. Rigot, Division of Administrative Hearings

WHEREAS, in the certain cause filed in this Court styled:

OFFICE OF INSURANCE REGULATION
AND ET AL.

Case No : 1D09-5799

v.

Lower Tribunal Case No : 09-3042RX

SERVICE INSURANCE COMPANY

The attached opinion was issued on November 10, 2010.

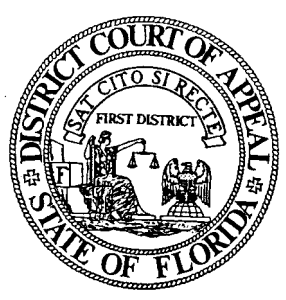
YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

WITNESS the Honorable Robert T. Benton, II, Chief Judge

of the District Court of Appeal of Florida, First District,

and the Seal of said Court done at Tallahassee, Florida,

on this 26th day of January 2011.



Jon S. Wheeler

JON S. WHEELER, Clerk
District Court of Appeal of Florida, First District

FILED

2011 JAN 27 A 11: 20

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF INSURANCE
REGULATION and FINANCIAL
SERVICES COMMISSION,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

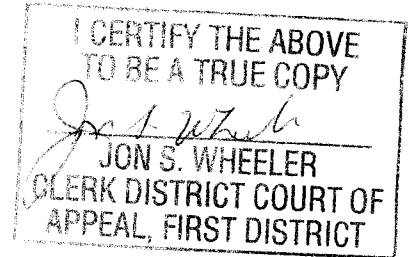
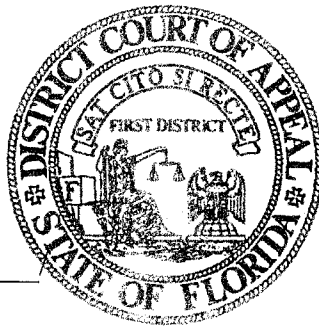
Appellants,

CASE NO. 1D09-5799

v.

SERVICE INSURANCE
COMPANY,

Appellee.



Opinion filed November 10, 2010.

An appeal from an order of the Division of Administrative Hearings.

S. Marc Herskovitz and Elenita Gomez, Office of Insurance Regulation, Tallahassee, for Appellants.

Douglas A. Mang and Richard J. Santurri of Mang Law Firm, P.A., Tallahassee; Maria E. Abate and Randon E. Loeb of Colodny, Fass, Talenfeld, Karlinsky & Abate, P.A., Ft. Lauderdale, Amicus Curiae, for Appellee.

PER CURIAM.

The Office of Insurance Regulation and the Financial Services Commission, Appellants, appeal a final order determining that Florida Administrative Code Rule 69O-170.105(1)(d) was an invalid exercise of delegated legislative authority. They

argue, among other things, that the administrative law judge (“ALJ”) erred in exercising jurisdiction to review the rule, which had expired by repeal of its enabling statute before Service Insurance Company, Appellee, initiated its rule challenge. We agree. For this reason, we reverse the ALJ’s final order without reaching the remaining issues raised on appeal.

In 1996, the Florida Legislature amended section 627.062, Florida Statutes, to create an option for insurers to choose arbitration in lieu of a hearing pursuant to section 120.57, Florida Statutes, for the resolution of issues that arose when the then-existing Department of Insurance (“DOI”) took agency action with respect to a rate filing. Ch. 96-194, § 4, Laws of Fla. This option, which was codified at section 627.062(6), became effective January 1, 1997. Ch. 96-194, § 4, Laws of Fla. In addition to granting insurers the right to arbitrate, the Legislature directed DOI to adopt rules for arbitration. § 627.062(6)(b), Fla. Stat. (1996). DOI did so, and these rules were later transferred to the Financial Services Commission and the Office of Insurance Regulation pursuant to a government reorganization statute. Ch. 2002-404, § 2, Laws of Fla.; § 20.121, Fla. Stat. (2002).

In 2008, the Legislature amended section 627.062(6) to remove the arbitration option. Nevertheless, in June 2009, Appellee sought a determination from an ALJ that one of the rules adopted under the directive of the former version

of section 627.062(b) was an invalid exercise of delegated legislative authority. The ALJ reviewed the rule and declared it invalid.

Section 120.56(3)(a), Florida Statutes (2008), sets forth the parameters of an ALJ's jurisdiction to entertain a rule challenge. It provides that "[a] substantially affected person may seek an administrative determination of the invalidity of an existing rule *at any time during the existence of the rule.*" § 120.56(3)(a) (emphasis added). This statute does not authorize a rule challenge to a rule that is no longer in existence. See id.; Dep't of Revenue v. Sheraton Bal Harbour Ass'n, Ltd., 864 So. 2d 454 (Fla. 1st DCA 2003). Once a rule's enabling statute is repealed, the rule itself automatically expires. Canal Ins. Co. v. Cont'l Cas. Co., 489 So. 2d 136, 138 (Fla. 2d DCA 1986) (citing Hulmes v. Div. of Ret., Dep't of Admin., 418 So. 2d 269 (Fla. 1st DCA 1982)). Therefore, even if the rule is still in print, it is no longer effective and does not meaningfully "exist."

We recognize that our sister court in Witmer v. Department of Business and Professional Regulation, 662 So. 2d 1299 (Fla. 4th DCA 1995), held that an expired rule could be challenged as long as it was still being applied to the petitioner. While this holding may be a good policy, it does not reflect the plain language of section 120.56(3), which requires that a challenge be initiated during the existence of the rule. The plain language of the statute makes this requirement an issue of timing rather than substance. See §120.56(3)(a) ("A substantially

affected person may seek an administrative determination of the invalidity of an existing rule *at any time during the existence of the rule.*”) (emphasis added). For this reason, we disagree with the Witmer court and hold that the ALJ in the instant case erred in reviewing the expired rule. Because Appellee did not file its challenge during the rule’s eleven¹ years of existence, the challenge was too late, and the ALJ should have declined to review it. Consequently, we reverse.

REVERSED.

KAHN, LEWIS, and CLARK, JJ., CONCUR.

¹ The rule was adopted on August 31, 1997, and the amendments to section 627.062(6) eliminating the arbitration option became effective July 1, 2008.