OFFICE OF INSURANCE REGULATION

KEVIN M. MCCARTY
COMMISSIONER

IN THE MATTER OF: CASE NO.: 130437-12

PREMIER GROUP INSURANCE COMPANY
_____/

FINAL ORDER

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

In 2010, the Florida Office of Insurance Regulation (hereinafter "Office") issued a Notice of Intent to Issue Order to Return Excess Profits to Premier Group Insurance Company (hereinafter "Premier"), pursuant to Section 627.215, Florida Statutes, for the statutory review period covering calendar/accident years 2005, 2006, and 2007. Premier challenged the intended agency action and requested a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes. Premier's challenge resulted in bifurcated proceedings, the first involving an unadopted rules challenge and the second involving the merits of the case, specifically the issue of the Office's treatment of federal income taxes when determining the amount, if any, of excess profits pursuant to Section 627.215, Florida Statutes. The later is the subject of this Final Order, though as agreed, the record of the unadopted rules case was also used for the merits case. The matter was heard before the Honorable Lisa Shearer Nelson, Administrative Law Judge (ALJ) in Tallahassee, Florida. The unadopted rules case was heard on May 22 and 23, 2012, and the merits case was heard on September 13, 2012.

After consideration of the evidence, argument and testimony presented at the hearing, the ALJ issued her Recommended Order on December 19, 2012. (Attached hereto as Exhibit "A.")

The ALJ recommended that a Final Order be entered finding that two million, four hundred six thousand, three hundred and twelve U.S. Dollars and ten cents ($2,406,312.10) may be deducted for federal income tax expense incurred or allocated to Florida for purposes of Section 627.215, Florida Statutes and that Premier must return six hundred sixty thousand, nine hundred and seven U.S. Dollars and ninety cents ($660,907.90) in excessive profits to its policyholders.

Both Premier and the Office filed exceptions to the Recommended Order. Premier filed a response to the Office's exceptions. Based upon a complete review of the record, the Recommended Order and all exceptions and responses thereto, and the relevant statutes, rules and case law, the Office finds as follows:

EXCEPTIONS TO FINDINGS OF FACT

Section 120.57(1)(l), Florida Statutes, sets forth the standard an agency must use when reviewing the Recommended Order of the ALJ. As it relates to exceptions to findings of fact, it provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency.... 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 ALJ is allowed latitude to make factual findings and draw 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. Dep't of Banking & Fin., 346 So. 2d 569, 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. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Accord Wash & Dry Vending Co. v. Dep't of Bus. 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).

RULINGS ON EXCEPTIONS TO FINDINGS OF FACT

1. The Office excepts to Paragraphs 3 through 8, Subparagraph 5.a., the first and third sentences of Paragraph 13, the second sentence of Paragraph 26, Paragraph 33, Paragraph 34, Paragraph 38, the second sentence of Paragraph 40, the second sentence of Paragraph 41, Paragraph 42, and Paragraphs 44 through 48 of the Recommended Order. These exceptions are not accepted. The remaining exceptions are addressed below.

2. The Office excepts to the first sentence of Paragraph 13, which provides "No guidance is provided in section 627.215, in rule 69O-189.007, or in the instructions for Form F, to identify what expenses may properly be included in the Form F filing." The Office asserts that the plain language of Section 627.215(1)(a), Florida Statutes, provides that the expenses that may be included on the Form F are those that are "incurred in this state or allocated to this state for the calendar year," and that Form F delineates these expenses into categories, including a catch all category labeled "other expenses not included above." (Jt Ex. 3). The Office concedes that neither the form nor the rule provide an itemized list of expenses that may be reported. However, the Office contends that a statement that neither the form nor statute provides any guidance as to what may be included is factually inaccurate and not supported by competent and substantial evidence. The Office asks that the finding be rejected, or modified to reflect that the statute and rule provide that any expense related to workers' compensation business in Florida

that is incurred in Florida or allocated to Florida for the calendar year may be included. Accordingly, the undersigned finds that there is not competent and substantial evidence in the record to support that "no guidance" is given in the statute, rule, or Form F itself. This exception is accepted and the sentence in question is replaced with the following: "Section 627.215, rule 69O-189.007, and Form F provide that any expense related to workers' compensation business in Florida that is incurred in Florida or allocated to Florida for the calendar year may be included. Categories of such expenses are delineated on Form F. However, there is no itemized list of expenses that may be reported."

3. The Office excepts to Paragraph 23 in its entirety. It states in part that "Premier has filed a fourth amended Form F...." The Office excepts on the grounds that at the time the Recommended Order was filed, Premier had not filed a completed Form F with the Office, though it did offer an un-signed version into evidence. Due to this objection, Premier has subsequently filed such a Form F with the Office. There is ambiguity in the finding over whether the fourth amended Form F was "filed" with the ALJ or the Office. To the extent that "file" is a term of art and such a document should be "filed" with the Office for review, the finding would likely be interpreted to mean that the fourth amended Form F was "filed" with the Office. There is not competent and substantial evidence in the record to support such a finding. For clarification, Paragraph 23 will be modified based on competent and substantial evidence in the record to read as follows: "Premier entered into evidence a fourth amended Form F, which incorporated all of the stipulations of the parties to date, but had not yet been filed with the Office. The fourth amended Form F also includes an allocation of federal income tax expense based upon the statutory allocation methodology outlined in section 220.151, Florida Statutes (2009)."

4. The Office takes exception to the portion of Paragraph 24 of the Recommended Order that states, "Section 220.151 provides the statutory method for allocating federal income tax expenses for purpose of paying Florida corporate income taxes," as not supported by competent and substantial evidence in the record. Indeed, by Premier's own statements in the Revised Joint Pre-Hearing Stipulation, Section 220.151, Florida Statutes provides "a statutory allocation methodology to allocate federal taxable income to the State of Florida for Florida corporate income tax purposes." (emphasis added). (Rev. Jt. Pre. Stip. 3). Premier's position rests on utilizing the statutory allocation methodology outlined in Section 220.151, Florida Statutes, in an additional formula to calculate an amount of federal income tax expense to allocate to Florida. Though there is competent and substantial evidence in the record that Section 220.151, Florida Statutes provides a method for allocating federal taxable income to the State of Florida, there is not competent and substantial evidence in the record to support a finding that the statute itself allocates income tax expenses. Accordingly, this exception is accepted and the finding is modified to state: "Section 220.151 provides the statutory method for allocating federal taxable income for the purpose of paying Florida corporate income taxes."

5. The Office excepts to the portion of Paragraph 35 which states, "...which makes the allocation of earned premium much simpler than it would be...," as not being supported by competent and substantial evidence in the record. The Office notes and the evidence reflects that Premier allocated federal taxable income based upon direct written premium, not earned premium. This exception is accepted and the finding is modified to substitute "written premium" for "earned premium."

6. Premier takes slight exception to the portion of Paragraph 42 of the Recommended Order that states "Indeed, the Office acknowledged at hearing that it has

permitted the methodology of direct written premium in Florida divided by direct written premium written everywhere for the determination of other expenses for excess profits filings, and has only rejected the methodology on one occasion." Premier asserts that this incorrectly reflects the testimony of Mr. Watford. The evidence supports granting Premier's exception. To accurately reflect the competent and substantial evidence in the record, the first sentence of Paragraph 42 is replaced with the following: "Indeed, the Office acknowledged at hearing that it has permitted the methodology of direct written premium in Florida divided by direct written premium written everywhere for the determination of other expenses for excess profits filings. Mr. Watford could not recall an instance where the methodology has been rejected by the Office and could only recall one instance where any methodology was rejected by the Office."

7. The Office excepts to the endnote to Paragraph 48 of the Recommended Order, asserting that the finding is not supported by competent substantial evidence in the record. The endnote appears to be completely speculative and not supported by evidence in the record. Accordingly, the exception is granted to strike the endnote.

RULINGS ON EXCEPTIONS TO CONCLUSIONS OF LAW

8. Premier and the Office except to several of the ALJ's conclusions of law. Section 120.57(1)(l), Florida Statutes, sets forth the standard an agency must use when reviewing the legal conclusions in a Recommended Order:

> 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.

9. Premier takes exception to the Conclusion of Law in Paragraph 52, which states that Premier bears the burden to prove by a preponderance of the evidence that its allocation method is permissible and reasonable. Premier asserts that the Office bears the burden to prove by a preponderance of the evidence that Premier is required to return the amount of excess profits shown in the Office's Notice of Intent to Issue Order to Return Excess Profits, and thus also bears the burden of proof to establish the amounts supporting the Notice. However, Premier is asserting the affirmative position in this case, specifically that it should be able to deduct a portion of federal income tax, and that the methodology in Section 220.151, Florida Statutes, is a reasonable means to determine the amount to be deducted. "The burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); §120.57(1)(j), Fla. Stat. Accordingly, this exception is rejected.

10. The Office objects to the conclusion in the last sentence of Paragraph 55, which states: "No credible reason was presented why the method dictated for use by one state agency in allocating federal income tax cannot be used by another state agency to determine the same allocation for another purpose." The Office asserts that the ALJ incorrectly applied the wrong burden of proof. The ALJ expressed that she found Premier to have met its burden of proof. However, this sentence seems to impermissibly place a burden on the Office. Accordingly, the exception is accepted in this regard, and the sentence in question is stricken.

11. The Office also excepts to the ALJ's Conclusions of Law in the final sentence of Paragraph 52, the first sentence of Paragraph 55, Paragraph 56, and Paragraph 57. Given the

factual determinations made by the ALJ in this case, these remaining exceptions are not accepted.

EXCEPTIONS TO THE RECOMMENDATION

12. The Office excepts to the Recommendation of the ALJ based on its exceptions to the Findings of Fact and Conclusions of Law above and requests that the Recommendation be rejected. For the reasons discussed above, this exception is not accepted.

IT IS THEREFORE ORDERED:

1. The Findings of Fact of the ALJ, except as modified herein, are adopted in full as the Office's Findings of Fact.

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

3. The Recommendation of the ALJ is accepted as modified in accord with this Order

ACCORDINGLY, the Office finds that two million, four hundred six thousand, three hundred and twelve U.S. Dollars and ten cents ($2,406,312.10) may be deducted for federal income tax expense incurred or allocated to Florida for purposes of Section 627.215, Florida Statutes. Further, the Office orders that Premier must return six hundred sixty thousand, nine hundred and seven U.S. Dollars and ninety cents ($660,907.90) in excessive profits to its policyholders.

DONE and ORDERED this 28th day of March, 2013.

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, FL 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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