MARYLAND INSURANCE ADMINISTRATION

WARREN DUPLINSKY	*	REVIEW OF A RECOMMENDED
Complainant	*	DECISION ISSUED BY
	*	GERALDINE A. KLAUBER
v.	*	AN ADMINISTRATIVE LAW JUDGE
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY	*	OF THE MARYLAND OFFICE OF
Licensee	*	ADMINISTRATIVE HEARINGS
	*	OAH No.: MIA-INS-33-200100240
	*	MIA No.: 366-7/01

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SUBSTITUTED CONCLUSIONS OF LAW AND FINAL ORDER

Pursuant to Section 2-210(d) of the Insurance Article of the Maryland Annotated Code and pursuant to Title 31, Subtitle 02, Chapter 02, Section 12 of the Code of Maryland Regulations ("**COMAR**"), the undersigned Associate Deputy Commissioner, on behalf of the Maryland Insurance Commissioner, hereby issues this Final Order affirming in part and reversing in part the proposed Conclusions of Law and Recommended Order contained in the above-captioned Recommended Decision issued below through the Office of Administrative Hearings ("**OAH**").

On November 13, 2001, this case was heard by Administrative Law Judge ("**ALJ**") Geraldine A. Klauber. Testimony was provided by Judy Martell, Customer Relations Manager for Nationwide Insurance Company, the Licensee, and by Warren Duplinsky, the Complainant. On December 5, 2001 the ALJ issued a Recommended

Decision. On December 5, 2001 the Office of Administrative Hearings mailed the Recommended Decision to Mr. Duplinsky and to Ms. Martell.

Attached to the Recommended Decision were the Appeal Rights advising all parties that pursuant to COMAR 31.02.02.10, they were given an opportunity to file written exceptions with the undersigned, within twenty (20) days from receipt of the Recommended Decision. Pursuant thereto, Mr. Duplinsky requested and filed with this Office a copy of the hearing transcript. In a January 14, 2002 letter to me, Mr. Duplinsky enclosed for filing his Exceptions to the Recommended Decision but they were not copied to Ms. Martell. In January 18, 2002 letter to Mr. Duplinsky, I reminded him that all correspondence to the Commissioner must be copied to the opposing party but I copied my letter to Ms. Martell and enclosed a copy of Mr. Duplinsky's Exceptions. Nationwide elected not to file a Reply to the Exceptions.

I have carefully evaluated the documentary record in this case, the transcript of record, the Exceptions filed by Warren Duplinsky, and the Recommended Decision of ALJ Geraldine A. Klauber. Based thereupon, my conclusions are as follows.

There are a few, undisputed material facts. Mr. Duplinsky was the named insured on a "Golden Blanket" homeowners policy, No. 52-19HO-524-715, issued by Nationwide. The policy apparently had a one (1) year term and had last been renewed on May 22, 2000. Tr. at 13. During the early part of 2001, Mr. Duplinsky's home was beset by damages arising from pin hole water pipe leaks. As a result of a claim made on February 2, 2001 for damage due to a leaking pipe, Mr. Duplinsky was paid $957 by Nationwide. Similarly, as a result of a claim made on March 12, 2001 for damage due to a leaking pipe, Mr. Duplinsky was paid $2,144 by Nationwide.

As the ALJ correctly noted, the overriding question is whether Nationwide's proposed nonrenewal of Mr. Duplinsky's homeowner's policy was lawful. This overriding issue, however, breaks down to three issues:

(1) Pursuant to subsections (a)(2) and (g) of Ins. §27-501, was Nationwide's nonrenewal based on the application of underwriting standards that were reasonably related to the insurer's economic and business purposes?;

(2) Pursuant to subsection (n)(2) of Ins. §27-501, did Nationwide disclose to Mr. Duplinsky upon his May 2000 renewal that Nationwide considered claims history for purposes of canceling or refusing to renew coverage ("**the Claims History Notice**")?; and,

(3) Pursuant to Ins. §27-303(1), did Nationwide misrepresent pertinent facts or policy provisions that relate to the claim or coverage at issue?

Regarding the first issue, I affirm the ALJ's recommended conclusion that Nationwide proved by a preponderance of the evidence that its action to nonrenew was justified under the underwriting standards demonstrated. As the ALJ concisely summarized, Nationwide uses an underwriting standard which provides that it will not continue any homeowner's policy that has experienced two or more claims within a three year period. Nationwide presented supporting statistical evidence that was not impeached by Mr. Duplinsky. Nationwide's underwriting standards are based on the frequency, not the value, of claims made under its insurance policy. Thus, the relatively low monetary value of Mr. Duplinsky's respective claims is irrelevant with regard to this issue.

Regarding the second issue, I reverse as a matter of law the ALJ's recommended conclusion that Nationwide provided in its May 2000 renewal to Mr. Duplinsky the requisite Claims History Notice. Pursuant to subsection (g) of Ins. §27-501, Nationwide bore the burden of proving that it had complied with the statute's requirements. Simply, Nationwide did not meet its burden.

Subsection (n)(2) of Ins. §27-501 states, in full: "If an insurer considers claims history for purposes of canceling or refusing to renew coverage, the insurer shall disclose the practice to an insured at the inception of the policy and at each renewal." Since this was an affirmative responsibility put by the General Assembly on the shoulders of Nationwide, it was Nationwide's burden to prove that it made such a disclosure to Mr. Duplinsky at the May 2000 renewal.

Subsection (n)(2) became effective October 1, 1998 as part of a number of amendments to Ins. §27-501. 1998 MD. LAWS Ch. 651, 652. Ms. Martell testified that only since April 2000, however, did Nationwide begin to comply with Subsection (n)(2). At first glance, this admission of a year and a half delay in complying with an insurance statutory requirement is surprising. Indeed, under cross-examination, Ms. Martell candidly admitted that she was unaware of when the Subsection (n)(2) became effective. Tr. at 14, L. 8-12.

The record was not developed enough to gauge how serious was the nature of Nationwide's violation. As of October 1, 1998, the statute required only that Nationwide "disclose at each renewal" that it considered an insured's claims history "for purposes of canceling or refusing to renew coverage[.]" More detailed guidance about this disclosure, including specific language, minimum type size and its insertion on a

"notice of renewal premium," were subsequently provided through regulations promulgated by the Commissioner. Although regulations were adopted as emergency provisions effective February 4, 1999, the pertinent regulation -- COMAR 31.15.10.01 *et seq.* -- was not fully adopted and made effective until March 6, 2000. *See* 27:4 Md. R. 455). Regarding Subsection (n)(2) of Ins. §27-501, COMAR 31.15.10.04D required insurers to include the Claims History Notice "in a conspicuous location on the notice of renewal premium required by Insurance Article, §27-607, Annotated Code of Maryland."

On one hand, Nationwide should (and may) have been providing some form of "consideration of claims history" disclosure as of October 1, 1998. On the other hand, it was not until March 6, 2000 that Nationwide was expressly required to provide a standardized claims history notice "in a conspicuous location on the notice of renewal premium." It is understandable, then, that in April 2000 -- soon following the March 2000 adoption of the regulations -- Nationwide would begin to include Claims History Notices that complied with COMAR 31.15.10.04D. Even so, by its own testimony, Nationwide acknowledges that it was about a month late in complying with the COMAR requirements. Since Nationwide attempted to comply with Subsection (n)(2) commencing April 2000, however, what matters for this complaint is only whether Nationwide sent a lawful Claims History Notice to Mr. Duplinsky with his May 2000 renewal premium notice.

According to Ms. Martell, Nationwide complies with Subsection (n)(2) and COMAR 31.15.10.04D by printing a Claims History Notice on the back of each insured's renewal premium notice. Tr. at 12, L. 21-23, Tr. at 13, L. 10-13. Because

Nationwide does not keep copies of its renewal premium notices, Tr. at 12, L. 23-25, Tr. at 13, L. 19-20, neither Mr. Duplinsky's actual renewal premium notice nor his actual Claims History Notice was entered into evidence. As well, Nationwide did not introduce into evidence even a form copy of the *front* page of its standard premium renewal notice. Nationwide, however, did introduce as evidence a "generic" page containing the language of Nationwide's form Claims History Notice that it contends appears on the *back* of its standard premium renewal notice. MIA Ex. 4.

As Mr. Duplinsky accurately noted in his Exceptions, Ms. Martell conceded under cross-examination that she had *no* evidence that a Claims History Notice was actually sent to Mr. Duplinsky. Tr. at 13, L. 17-20. Consequently, to meet its burden of proof that Nationwide had complied with Subsection (n)(2) of Ins. §27-501, Nationwide relied upon evidence of its business practice to show that Nationwide had mailed a Claims History Notice to Mr. Duplinsky with his renewal premium notice.

Ms. Martell testified that Nationwide began to include a Claims History Notice with its renewal premium notices on April 4, 2000. Ms. Martell, however, had no documentary evidence to support this assertion. Tr. at 13, L. 21-25. In lieu of such evidence, Ms. Martell testified that, before the hearing, she had "checked with notices that [she had] received in the past that said what dates the [claims history] notice would start going out on the billings, and that was April 4 of 2000." Tr. at 14, L. 1-4. Solely on this basis, the ALJ concluded as a finding of fact that "it has been the Licensee's standard business practice to include on the back portion of all policyholders' renewal billing statements that claims history could be considered for purposes of cancellation or nonrenewal of the policy." Rec. Dec. at 3-4, Finding of

Fact No. 7. Again, solely on this basis, the ALJ concluded as a finding of fact that Mr. Duplinsky actually received a May 2000 renewal billing statement that contained a Claims History Notice.

It is at this juncture that, with all due respect, I part company with the ALJ. Through a series of cross-examination questions, it was made clear that Ms. Martell had no first-hand knowledge about Nationwide's business practice in this regard. Tr. at 13-15. Additionally, Ms. Martell had no particular knowledge at all about Nationwide's business practice of mailing Claims History Notices. *Id*. That is, Ms. Martell did not know under whose direction at Nationwide it was implemented, how it was implemented, and whether any quality control checks were performed to insure that the practice of sending Claims History Notices was being done across the board to all insureds.

Ms. Martell's testimony is second or third level hearsay. That is, Ms. Martell is testifying to her memory of the contents of documents (which are hearsay in themselves), not introduced as evidence, in which an unidentified author, whose personal knowledge of the subject cannot be verified or challenged, apparently described to other unnamed addressees the implementation and terms of a new business practice concerning the inclusion and mailing of important claims history notices.

Hearsay evidence is not only admissible in administrative hearings in contested cases "but also such evidence, if credible and of sufficient probative force, may indeed be the sole basis for the decision of the administrative body." *Eger v. Stone,* 253 Md. 533, 542 (1969). The Court of Appeals, however, "has remained steadfast in

reminding agencies that to be admissible in an adjudicative proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Travers v. Baltimore Police Dept.*, 115 Md.App. 395, 411 (1996), citing *Motor Vehicle Admin. v. Karwacki*, 340 Md. 271 (1995) (holding that criteria of reliability is applicable to hearsay evidence). It is not the hearsay nature of proffered evidence that is determinative of whether such evidence is admissible. Instead, "the evidence's probative value, reliability, and fairness of its utilization are the principal factors considered in the competency analysis." *Travers*, 115 Md.App. at 413.

Based as much on the absence of evidence in this case as well as upon the facts that were presented herein, I find as a matter of law that the probative value of Ms. Martell's hearsay testimony is so minimal and its utilization so unfair that this hearsay testimony was improperly considered. This does not reflect upon Ms. Martell's personal credibility because I believe that she testified honestly. As noted earlier, however, we learn nothing of substance about Nationwide's business practice other than a conclusory remark, based on hearsay, that a business practice was implemented on April 4, 2000.

Another factor to consider here is the relative newness of Nationwide's business practice policy. There is no date on which Mr. Duplinsky's renewal bill was sent because Nationwide does not keep copies of its renewal billings. Tr. at 13. To have complied with the requisites of Ins. §27-607(a), however, Nationwide had to have provided its renewal bill to Mr. Duplinsky by no later than by May 5, 2000.

In other words, Nationwide made major revisions to its renewal premium notices no more than a month before Mr. Duplinsky received his May 2000 renewal premium notice. Based on the newness of this business practice and based on the other facts before me here ---- which, again, are limited to a representation by someone with no personal knowledge of the implementation of this business practice and whose knowledge is based on the contents of memoranda not in evidence and authored by unknown persons -- it is not unfair to infer that the implementation of this practice did not go perfectly and that at least some persons -- including, perhaps, Mr. Duplinsky -- may not have received the new renewal billing form with the Claims History Notice on the back.

As a separate ground for reversal, and assuming *arguendo* that Nationwide sent a Claims History Notice to Mr. Duplinsky, I also find that Nationwide has failed to prove that the Notice was placed in a "conspicuous location" as required by COMAR 31.15.10.04D. To determine the meaning of COMAR 31.15.10.04D, we proceed in the same manner as would a court in construing a statute. That is, we try to ascertain and carryout the Commissioner's intention in promulgating the regulation under review. *See Guardian Life Ins. Co. of America v. Ins. Comm'r of State of Md*., 293 Md. 629, 642 (1982). Unless the words are technical in nature or their context dictates otherwise, we give the words of a regulation their plain and common meaning. *See Gordon Family Partnership v. Gar On Jer*, 348 Md. 129, 137-138 (1997). *Id*. Overall, we construe a regulation in a commonsensical manner. *Id*.

The plain and common meaning of the word "conspicuous" is "easy to notice; obvious." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 302 (1984). This

meaning comports with both the 1998 amendments to Ins. §27-501, of which it was a part, and its use in the pertinent regulations. Many of the 1998 amendments concerned the use of claims history for underwriting purposes. Some of those amendments restricted the use of claims histories while others expressly or implicitly approved or made easier their use by insurers.[1] In either event, these application of these amendments would likely have a significant impact upon personal and commercial lines insureds. Thus, it is fair to state that, in promulgating COMAR 31.15.10.04D and its requirement of a claims history notice to be "conspicuously located on the notice of renewal premium," the Commissioner was trying to make sure that insureds would be made aware if their insurer used claims histories for underwriting purposes. With such awareness, insureds could both shop for insurance and decide on their insurance options, such as the amount of deductibles, in an informed manner.

I do not believe that Nationwide proved that a Claims History Notice was "conspicuously located on the notice" of renewal premium sent to Mr. Duplinsky. Nationwide concedes that, even if the Notice had been sent, it would have been placed on the *back* of its renewal premium notice. Since the front of the renewal premium notice was never introduced, we have no idea what evidence would support a conclusion that the Notice was "conspicuously located." Until and unless such

[1] For example, pursuant to the 1998 amendments to Ins. §27-501, insurers were permitted to use weather-related claims to cancel or nonrenew a homeowners insurance policy and were relieved of the burden of "producing statistical validation that excludes weather-related claims" in certain circumstances to justify their adverse underwriting actions. Insurers, however, were prohibited from canceling or nonrenewing a homeowners policy for weather-related claims "unless there were three or more weather-related claims within the preceding 3 years." Ins. 27-501(I), (J)(2).

evidence were introduced, Nationwide lacks the basis to present an argument, for example, that it could comply with the regulation by putting a warning to insureds on the front of the renewal premium notice to read the other side of the page for important information.

It is also for this reason that I disagree with and reverse the ALJ's Finding of Fact No. 8 and the ALJ's conclusion that "the Complainant's assertion that he did not receive this [claims history] notice" to be not credible. In reviewing the ALJ's decision, we are "bound by the findings of fact that are supported by competent, material, and substantial evidence." COMAR 31.02.02.12B. We construed this regulation in *MIA ex. rel. Howard F. Rosenstein v. Berkshire Life Ins. Co.*, "Substituted Conclusions Of Law And Final Order," MIA-688-12/88 (April 17, 2000)[2]:

> Accordingly, the Commissioner is not bound by an ALJ's factual findings unless the evidence supporting those findings is legally appropriate, relevant and ample. Because the term "substantial" is meaningful only when put into the context of the total quantum of evidence adduced at the hearing, the Commissioner will not be bound by an ALJ's factual findings unless it is supported by substantial evidence in relation to all of the evidence adduced at the hearing. If, then, there is ample evidence supporting both parties and the ALJ has *properly* considered *all* of the evidence, the Commissioner will be bound by the ALJ's findings of fact and will not reweigh the facts to come to a different conclusion. As well, so long as *"credibility"* is synonymous with witness *demeanor*, and the oral testimony of witnesses is conflicting about a fact to be found, the Commissioner will give special deference to the ALJ's finding about a witness's credibility. *See Dept. of Health and Mental Hyg. v. Shrieves,* 100 Md.App. 283, 298-302 (1994).

The ALJ made her adverse credibility finding with the qualification, "While it is *very likely* that the Complainant *may not have noticed the language contained on the back* of the May 2000 billing." (Rec. Dec. at 8). Of course, had the notice been

"conspicuously located," it would not have been "very likely" that Mr. Duplinsky could have overlooked the Claims History Notice. In making that finding, then, it is clear that the ALJ was not making a negative judgment about Mr. Duplinsky's honesty based on his "demeanor" but rather on a logical but improper inference. Further, and as discussed above, I do not believe that the ALJ properly evaluated the deficiencies in Nationwide's testimony about its business practices and, consequently, did not base her conclusion on "all of the evidence." Moreover, and as highlighted by the ALJ's comment above, the governing COMAR regulation was of great import here but it was neither cited nor applied in the Recommended Decision.

Because of these conclusions, I need not reach, and thus do not decide, the third issue presented here, that is, whether Nationwide misrepresented pertinent facts or policy provisions to Mr. Duplinsky that relate to the claims or coverages at issue.

CONCLUSION OF LAW

For the reasons stated above, I hereby conclude that Nationwide's May 2000 renewal notice to Mr. Duplinsky was in violation of Subsection (n)(2) of Ins. §27-501 and also of COMAR 31.15.10.04D. Consequently, I am reversing the ALJ's Recommended Decision and, pursuant to Ins. §27-505(a), I am ordering Nationwide to renew Mr. Duplinsky's homeowner's policy upon Nationwide's request for, and Mr. Duplinsky's timely payment of, the proper premium.

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[2] *Aff'd*, *Berkshire Life v. MIA*, Balt. County Cir. Ct. Case. No. 24-C-00-002516 (Oct. 12, 2000, Heard, J.), *aff'd*, Ct. Spec. App. (No. 1235, 48, Sept. Term. 2000, Dec. 20, 2001 [mandate pending])

ORDER

THEREFORE, it is hereby

ORDERED, that the Recommended Decision of ALJ Geraldine A. Klauber be and is hereby AFFIRMED in part and REVERSED in part, consistent with this Final Order; and, it is hereby further

ORDERED that the Licensee, Nationwide Mutual Fire Insurance Company, pursuant to Ins. §27-505(a), renew Mr. Duplinsky's homeowner's policy, effective May 22, 2001, for its full term, upon Nationwide's request for, and Mr. Duplinsky's timely payment of, the proper premium; and, it is further

ORDERED, that the records and publications of the Maryland Insurance Administration reflect this decision.

It is so **ORDERED** this _____ day of February, 2002.

STEVEN B. LARSEN
INSURANCE COMMISSIONER

_____
Thomas Paul Raimondi
Associate Deputy Commissioner