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**Appeal of Composite Company, Inc., of a Classification
Assignment by the Workers' Compensation Rating
and Inspection Bureau of Massachusetts
Docket No. W2019-01**

**Order on the Workers' Compensation Rating and Inspection Bureau's
Motions to Correct the Record and for Reconsideration
and Appeal Pursuant to M.G.L. c. 26, §7.**

On February 9, 2022 a decision (the "Decision") was issued on the Composite Company's appeal of a decision by the Workers' Compensation Rating and Inspection Bureau ("WCRIB") Appeals Committee arising from the assignment of Composite to a particular classification code for work performed on a building project. The Decision reversed the Appeals Committee decision and remanded the matter to the WCRIB for consideration in light of the principles and concerns articulated in the Decision. The WCRIB then sought further review of the Decision; between February 11 and March 11, 2022, the parties submitted the following communications to the record; responses from the presiding officer are shown in brackets.

February 11. The WCRIB requested information on the format for appealing the Decision pursuant to M.G.L. c. 26, §7.

[The WCRIB was advised that the statute does not prescribe a format.]

February 11. The WCRIB sent a letter to the Commissioner of Insurance that is described in the transmittal e-mail as a "notice of appeal."

March 1. The WCRIB submitted a Motion to Correct the Record and a Motion for Reconsideration.

March 3. Composite Company responded to the WCRIB's motions.

March 4. The WCRIB replied to the Composite Company's March 3 letter.

March 4. Composite Company requested time to respond to the WCRIB's March 4 letter.

[On March 7, Composite Company was ordered to file any response by March 15.]
March 11. Composite Company filed its response to the WCRIB March 4 letter.

I. Appeals Pursuant to M.G.L. c. 26, § 7.

Chapter 26, § 7 authorizes the Commissioner of Insurance to appoint staff to perform the agency's functions, such as presiding over hearings that the Division is authorized to hold. It further provides that, if the hearing was held by someone other than the Commissioner, a person aggrieved by the decision issued after the hearing may appeal the decision to the Commissioner. The appeal must be filed within three days after the decision is filed, or within a further period that the Commissioner may allow. After review, the Commissioner may modify, affirm or reverse the decision.

The Decision at issue in this appeal was issued and delivered to the parties by e-mail on February 9, 2022. The statutory three-day appeal period, if viewed linearly, would have required the WCRIB to file its notice on a Saturday; if viewed as "business" days, the WCRIB's deadline would have been February 14. The Division did not receive an appeal on either of those dates. Instead, on February 11, the WCRIB sent the Commissioner a letter that it described as a "notice of appeal" but in fact stated that the WCRIB had not decided whether to appeal but wanted to preserve what it considered its right to appeal under § 7. It did not request a specific time period within which to appeal.

The WCRIB offers no legal support for the premise that notice to the Commissioner within three days after the Decision was filed that it had made no decision on an appeal in effect indefinitely preserved a right to do so. The WCRIB chose not to ask the Commissioner, within the time period specified by statute, to allow a specific time frame for filing an appeal that, if allowed, would have given it additional time to make its decision.

To the extent that the WCRIB is seeking to enlarge the time period for filing a § 7 appeal, it has offered no persuasive reason to allow it to do so.

II. The Motions to Correct the Record and for Reconsideration

On March 11, 2022, the WCRIB filed two motions, a Motion to Correct the Record and a Motion for Reconsideration. As procedural support for those Motions it relies on the Standard Adjudicatory Rules of Practice and Procedure for formal administrative proceedings, 801 CMR 1.01, specifically Rule 1.01(7)(1), that allows a party to move for reconsideration after a

decision is issued, and before the expiration of the time for filing a request for review or appeal.¹ The rule requires the motion to identify a “a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case”.² The WCRIB’s reliance on Rule 1.01(7)(1) as grounds for requesting reconsideration of the Decision is misplaced.

Appeals filed pursuant to M.G.L. c. 152, §52D (“§52D”) differ from proceedings which are held pursuant to 801 CMR 1.01. 801 CMR 1.01 specifically applies to adjudicatory proceedings, defined in M.G.L. c. 30A, §1 as “a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing.” Composite Company’s appeal does not arise from an action taken by the Division of Insurance that affected the company’s legal rights, duties or privileges; it seeks review of the merits of a decision issued by an entity that is overseen by the Commissioner of Insurance.

The parties do not dispute that Composite is appealing an action taken by the WCRIB, a rating organization, that is authorized under §52D. By letter dated March 3, 2022, Composite Company noted that §52D does not provide for a motion to correct the record. The WCRIB agrees that there are no procedural rules directly linked to §52D appeals but asserts that the Division conducts §52D appeals hearings under 801 CMR 1.01. It provides no support for that position.

Section 52D establishes a framework in which employers that obtain workers’ compensation insurance through an insurer that is a member of the WCRIB may raise questions about matters affecting their rates, such as their business classifications. The statute requires the WCRIB to provide to insureds such as the Composite Company information on its rates and to provide reasonable means for a person aggrieved by the application of the WCRIB’s rating system to be heard on that issue. A person affected by the WCRIB’s action may, within 30 days after it is notified of that action, appeal to the Commissioner. After a hearing at which the appellant and the rating organization have an opportunity to present their arguments, the Commissioner may affirm or reverse the WCRIB’s action. Section 52D appeals are analogous to statutory appeals

¹ The WCRIB also states that it relies on Massachusetts Rule of Civil Procedure 61.

² The WCRIB’s reasons for submitting two separate motions are unclear. According to the rule, the identification of alleged errors is an essential component of a motion for reconsideration.

that may be taken to the Commissioner from decisions by entities such as Commonwealth Automobile Reinsurers (“CAR”) and the Massachusetts Property Insurance Underwriting Association (the “Fair Plan”) that, like the WCRIB, are overseen by the Division. The statutes authorizing such appeals may allow the Commissioner to affirm or reverse, or in some instances modify, the entity’s decision. The Commissioner’s decision is based on a review of the prior proceedings before the particular entity; the parties are required to submit the entire record of those proceedings including the documents submitted to each committee or other group that heard the dispute at the entity and transcripts of every hearing that was held. On appeal, the parties may be allowed to submit documentation relevant to their arguments to affirm or reverse the decision, in addition to their briefs or memoranda. In such circumstances, as part of the Commissioner’s appeal hearing, each party has the opportunity to voice objections to documentation submitted by the other party to ensure that briefs or memoranda are based on an established record.

The Commissioner’s task is to review the record and determine whether the entity’s decision was legally and procedurally correct and supported by substantial evidence.³ The Commissioner’s standards for that review were articulated in 2013 in a decision on an appeal from a CAR decision.⁴ The decision noted that CAR’s responsibilities, as manager of the residual market for motor vehicle insurance, include hearing disputes relating to the operation of that market. In exercising that adjudicatory function, its obligations are to act as a neutral and unbiased factfinder, to conduct fair and impartial hearings and to interpret and to apply its rules reasonably. Ultimately the Commissioner’s task, in summary, is to conduct an independent review of a decision and to determine whether the organization satisfied its obligations. That 2013 decision then analogized the Commissioner’s task to judicial review of decisions by regulatory agencies exercising adjudicatory functions that are also conducted on the record below. It concluded that the standards for such review set out in M.G.L c. 30A, §14 provide appropriate guidelines for commissioners who hear statutory appeals reviews of decisions by other entities.

³ In this particular case, Composite Company and the WCRIB supplemented the record from the WCRIB appeals committee with documents relating to the classifications at issue, a chronology of Composite’s classification history, and the circumstances of the particular job.

⁴ Appeal of the Calianos Agency of a Decision of Commonwealth Automobile Reinsurers, DOI Docket C2012-01 (November 25, 2013)

The WCRIB does not challenge the review process that was utilized in this appeal but disagrees with the decision to reverse the WCRIB's decision and to remand it for further consideration. It offers no persuasive argument that in a §52D appeal it may rely on 801 CMR 1.01 as support for its motions to reconsider the Decision or to correct the record. The motions are denied.

III. Reconsideration of a Decision

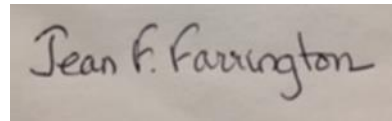
Even if 801 CMR 1.01 (7)(l) applied in a §52D appeal, an overview of the WCRIB's motions suggests that they do not comply with the regulatory requirements. The principles governing motions for reconsideration require a litigant to identify clerical or mechanical errors in a decision or a significant factor the agency or presiding officer may have overlooked in deciding the case. Composite Company points out that the Division of Administrative Law Appeals, in interpreting the rule, states that it is not an opportunity to reargue settled matters or make arguments that could or should have been raised earlier in the proceeding. Similarly, appeals from administrative decisions must be based on an appellant's perceived deficiencies in those decisions and its arguments that those deficiencies establish a legal basis for overturning it.

Both parties to this §52D appeal in effect apply the standards expressed in Rule 1.01 (7)(l) to the WCRIB's requests for post-Decision relief. Addressing the content of the WCRIB's motions, Composite Company observes that in its motions the WCRIB objects several times to a chosen descriptive term in the Decision and as a basis for its other objections urges reconsideration because the Decision may have overlooked significant factors. On the first issue, the WCRIB identifies no clerical or mechanical errors related to those word choices. Addressing the second issue, Composite Company cites to specific sections of the Decision to demonstrate that none of what the WCRIB refers to as significant factors were overlooked.⁵

⁵ The WCRIB also claims that it filed its motion in reliance on Massachusetts Rule of Civil Procedure, 61, Harmless Error. It provides, in pertinent part, that "[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." The WCRIB does not offer any support for applying that principle to this Decision.

Composite further objects to the WCRIB's claim that its motion "is not in the nature of an appeal." Those WCRIB's posthearing motions consistently seek to set aside the remand and revise the Decision to approve the decision of its Appeals Committee. The WCRIB supports its desired outcome by reiterating or expanding on arguments that it made in the course of the proceeding. Review of both parties post-Decision submissions suggests that the WCRIB's objections to the Decision fall within the scope of matters that could have been raised in an appeal to the Commissioner and addressed in that context. I express no opinion on the outcome of any such appeal.

Dated: May 18, 2022

A rectangular box containing a handwritten signature in dark ink that reads "Jean F. Farrington".

Jean F. Farrington
Presiding Office

Affirmed: May 19, 2022

A handwritten signature in dark ink, appearing to read "Gary D. Anderson", written over a horizontal line.

Gary D. Anderson
Commissioner of Insurance

Sent by electronic mail to:

Virginia McCarthy, ymmccarthy@wcribma.org

Thomas Heald, tw@healdandleboeuf.com

