

STATE OF WASHINGTON,
OFFICE OF THE INSURANCE COMMISSIONER

FILED

2016 MAY 20 A 8:00

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of)
)
)
Leo J. Driscoll,)
 Applicant)
)
)
)
)
)

Hearings Unit Case No. 16-0002
Applicant's Reply to the OIC's Response to
Applicant's Motions for Partial Summary Judgment

PART I. Applicant's Reply to the OIC's Response to Applicant's Third Motion for Partial Summary Judgment that would find, adjudicate, and determine that "long-term care insurance" (LTCI), as defined by RCW 48.84.020 is not "disability insurance" (or an "insurance appertaining thereto") within the meaning of RCW 48.11.030.

- A. OIC's Response to Applicant's Motion for Partial Summary Judgment (which Response was *served on Applicant and filed May 13, 2016*) cited Chapter 48.21 A RCW as including provisions that show that "long-term care insurance", as defined by RCW 48.84.020 is "disability insurance" within the meaning of RCW 48.11.030. The OIC had not previously mentioned or referenced Ch, 48.21 A RCW and applicant previously was unaware of and had not considered those laws in advancing Applicant's Motion for Partial Summary Judgment on the issue.
- B. Applicant's review of those laws persuades applicant that RCW 48.21A .030 authorizes disability insurers to issue "hospice care insurance" and "home health care insurance", i.e., "extended health insurance against financial loss from accident or disease, or both". Those contingencies appear to be included in the contingencies which RCW 48.11.030 identifies as contingencies insured against by "disability insurance".
- C. They likewise are contingencies insured against by LTCI under Subsection (1) of RCW 48.84.020 which provides in relevant part: "*Long-term care insurance or long-term care benefit contract means any insurance policy or benefit contract primarily advertised, marketed, offered, or designed to provide*

*coverage or services for either institutional or community-based convalescent, custodial, chronic, or terminally ill care * * * .*

- D. Given the light of those laws, Applicant **hereby withdraws** Applicant's Motion for Partial Summary Judgment that would determines that "long-term care insurance" (LTCI), as defined by RCW 48.84.020 is not "disability insurance" (or an "insurance appertaining thereto") within the meaning of RCW 48.11.030. Applicant asks that the OIC and the Presiding Officer take that withdrawal into account in these proceedings including that such is not an acknowledgement by applicant that disability insurance is not subject to the provisions of RCW 48.19.030 and other provisions of Ch. 48.19 RCW.
- E. To the contrary, as set forth at Section V-B, pp. 14-15 of Applicant's Response to the OIC's Dispositive Motions, the OIC previously acknowledged that rate increase filings for LTCI are to be submitted to the OIC with evidence supporting the filing as required by RCW 48.19.030, RCW 8.19.040, and WAC 284-54-630. Additionally, the OIC has previously acknowledged that *RCW 48.19.010(1) originally excluded disability insurance from the provisions of Ch. 48.19 RCW and that RCW 48.19.010(2) placed disability insurance within the purview of that regulatory section*. See Applicant's Exhibits 18 and 20 filed herewith, the relevant content of which is set forth in paragraphs A-1 and A-2 of Part II immediately below.

PART II. Applicant's Reply to the OIC's Response to Applicant's First Motion for Partial Summary Judgment that would find, adjudicate, and determine that the information submitted by MetLife to the OIC in support of the 22.69% premium increase was insufficient to permit the Commissioner to determine that the submission meets the requirements of Ch. 48.19 RCW, as required by RCW 48.19.040(1) and (2), and in particular, that *due consideration* had been given by MetLife and by the OIC to the requirements of RCW 48.19.030.

- A. The OIC's Response does not address RCW 48.19.010(2) and the OIC's past interpretation that *RCW 48.19.010(1) originally excluded disability insurance from the provisions of Ch. 48.19 RCW and that RCW 48.19.010(2) placed disability insurance within the purview of that regulatory section*.
1. Applicant's Exhibit 18 submitted herewith is a true and complete copy of pages 7 and 8 of OIC's Motion for Summary Judgment signed and filed on

November 7, 2014 by Ms. Mandy Weeks as counsel of record for the OIC in the matter of Hearings Unit Docket No. 14-0187. At p. 7, line 25, to p. 8, line 2 ending with footnote 2, the following statements appear:

"The Insurance Code, in combination with the Washington Administrative Code (WAC284) provide the requirements for rate filings, including rate filings for disability insurance premiums. See RCW 48.19" (after which footnote 2 appears) which footnote states:

"2. RCW 48.19.010(1) originally excluded disability insurance from this section; however RCW 48.19.010(2) placed disability insurance within the purview of this regulatory section."

2. As shown in Applicant's Exhibit 20 filed herewith, in the judicial review proceedings of Hearings Unit Docket No. 14-0187 before the Spokane County Superior Court, Civil Cause No. 15-2-00920-1, the OIC, there represented by the Attorney General, reiterated OIC's position regarding the effect of RCW 48.19.020(2) on the provisions of RCW 48.19, by again stating in footnote 7 to the Insurance Commissioner's Response to Petition for Judicial Review:

. "RCW 48.19.010(1) originally excluded disability insurance from this section; however RCW 48.19.010(2) placed disability insurance within the purview of this regulatory section."

3. Notwithstanding the foregoing statements, and without any explanation for change of its position, the OIC now argues at pg. 6, line 16 to p.7, line 13, of the OIC's Response in Opposition to Summary Judgment contends that the provisions of RCW 48.19.010(2) only require filing the manual of classification, manual of rules and rates, and any modification thereof, and that the provisions of RCW 48.19.030 and RCW 48.19.040 "are not applicable to disability insurance."

4. At p. 9. Footnote 4, of the OIC's Response, the OIC also states:

"Petitioner also asserts that the OIC has acknowledged that RCW 48.19.030 applies in this matter simply because of a citation in a twenty-nine page brief in **another matter**. The OIC does not acknowledge that this statute applies, **RCW 48.19.030 was not in issue during that matter**. Further, mere reference to this RCW is not agency opinion nor is it binding. Only the Insurance Commissioner or the Presiding Officer may create binding precedence." (**emphasis added**)

5. The OIC's representation made to this administrative tribunal *that "RCW 48.19.030 was not in issue during that matter"* (i.e., the Hearings Unit 14-

0187 matter) is incorrect; cannot be reconciled with the followings facts; and should not be given credence:

- As stated in the writing identified as Applicant's Exhibit 19-a filed herewith, paragraph 1.34 of Applicant's Application made to the Insurance Commissioner in OIC Hearings Unit Docket No. 14-0187 alleged:

"1.34 The MetLife submissions to the OIC accompanying the request did not address past and prospective loss experience of the series LTC.04(WA) policy forms singularly and within the state. RCW 48.19.030(3)(a) mandates that "Due consideration in making rates for all insurances shall be given to:(a) Past and prospective loss experience within this state for experience periods acceptable to the commissioner. If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state."

- As stated in the writings identified as Applicant's Exhibit 19-b filed herewith, paragraph 18 of the Declaration of OIC actuary Scott Fitzpatrick dated November 7, 2015, filed in OIC Hearings Unit Docket No. 14-0187 stated at p.3, lines18-21 :

*"For example, information alleged to be missing in Petitioner's paragraphs 1.32, 1.33, 1.34, . . . * * * are found at pages 12 through 15 of the Actuarial Memorandum. . . * * *"*

6. The OIC's Response to Applicant's First Motion for Partial Summary Judgment does not contend that the following provisions of RCW 48.19.030 are ambiguous:

"Rates shall be used, subject to the other provisions of this chapter, *only* if made in accordance with the following provisions: . . . * * * (3) Due consideration in making rates for all insurances shall be given to (a) Past and prospective loss experience **within this state for experience periods acceptable to the commissioner: **If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state.**"**
(bold emphasis added).

7. OIC's Response contends that such provisions are not mandatory but fails to acknowledge the existence and significance of the words "only" and "shall" in RCW 48.19.030, critical omissions given the force and impact of those words. Instead, the OIC Response focuses on the words "Due consideration in making rates for all insurances shall be given..." and ignores the words "Rates shall be used, subject to the other provisions of this chapter, *only* if made in accordance with the following provisions: . . . * * *."

8. At p.8, lines 20-21, the OIC's response contends that ". . . RCW 48.19.030 is applicable to the insurer, not the Insurance Commissioner." That statement standing alone fails to recognize that RCW 48.19.040 provides that every such filing "must be accompanied by sufficient information to permit the Insurance Commissioner to determine whether it meets the requirements of this chapter."
9. In addressing the provisions of RCW 48.19.030(3)(a), the OIC's Response offers evidence that the loss experience of the subject forms in Washington. of itself, is not statistically credible. However, the OIC's Response does not contend that the OIC acquired, required, or sought information as to the loss experience of the subject forms in states of the United States which are likely to produce loss experience similar to that of this state, as provided by RCW 48.19.030(3)(a).
10. The OIC's Response at pg, 8, line 25 to pg. 9, line 7, argues that Applicant is interpreting the provisions of RCW 48.19.030(3)(a) in "an overly restrictive way". Applicant replies that those provisions are plain and unambiguous and are to be interpreted to mean what they say.¹
11. The OIC's Response does not acknowledge that under RCW 48.19.030(3)(a) if the insurer determines and shows the OIC that loss experience within the state is not statistically credible, the provisions of RCW 48.19.030(3)(a) nonetheless do not permit an insurer to use *nationwide* loss experience in lieu of using "*loss experience in those states which are likely to produce loss experience similar to that in this state.*" Here, the OIC assumes that there are no such other states without having made inquiry of the insurer or elsewhere as to their existence and make the unwarranted leap of accepting *nationwide* experience which the statute does not permit.
12. The OIC's Response discounts the Applicant's references to the Lewin Group Report #2002 (Applicant's Exhibit 13), cited segments of which evidence the negatives of using nationwide loss ratio experience rather than to use loss experience in states which are likely to produce loss experience similar to that in this state. Applicant submits that the OIC's discounting of such evidence relates to the weight and not to the admissibility of such evidence in these proceedings

¹ See case law authorities cited at Applicant's Motion for Partial Summary Judgment, pp 8-9, The OIC's Response did not address those authorities.

PART III. Applicant's Reply to the OIC's Response to Applicant's Second Motion for Partial Summary Judgment as to Applicant's Standing in this Matter

- A. The OIC's Response to Applicant's Motion for Partial Summary Judgment on the issue of Applicant's standing raises only one new matter that was not anticipated and addressed in Applicant's Motion on the issue of standing, specifically:

The OIC's Response, at p, 11. Lines 14-15, states: "*Petitioner claims that his contract is unfair and that he is aggrieved as a result of premium versus benefits in his long-term care insurance contract.*" That is a false, flatly untrue statement.

What is true is that the Applicant's Motion alleged at p.13, paragraph 1.1-a that: "*The OIC's action of approving MetLife's request for a 22.69% increase in the LTCI policies which were issued to applicant and his spouse Mary T. Driscoll has prejudiced or is likely to prejudice applicant within the meaning of RCW 34.05.530.*"

- B. Applicant has nothing further to offer in this reply on the issue of applicant's standing in this proceeding. In ruling on that issue, applicant requests that the Presiding Officer fully take into account pages 9-14 of APPLICANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT which show why applicant has standing in this matter .

Signed and submitted May 19, 2016.



Leo J. Driscoll (pro se)
4511 E. North Glenngrae Ln.
Spokane, WA 99223