

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WASHINGTON ASSIGNED RISK PLAN,)	NO. 59875-9-I
)	
Appellant,)	DIVISION ONE
v.)	
)	
STATE OF WASHINGTON OFFICE OF)	
INSURANCE COMMISSIONER,)	Unpublished Opinion
)	
Respondent.)	FILED: April 21, 2008
)	

Lau, J.—The issue in this case is whether an administrative hearing officer for the Office of the Insurance Commissioner (OIC) erroneously interpreted the operating procedures of a legislatively created insurance plan. The hearing officer concluded that sending notice of an offer to renew an insurance policy by facsimile (fax) did not satisfy the requirement in the procedures to “send a notice” because fax was not sufficiently reliable. We affirm the hearing officer’s order because her conclusion that faxes are not sufficiently reliable is supported by substantial evidence and her interpretation of the operating procedures on this point is entitled to deference.

FACTS

Washington state has a comprehensive state-funded workers’ compensation

scheme. While most employees are covered under the plan, longshore and harbor workers are not. Federal law, however, requires maritime employers to secure insurance for their longshore and harbor workers. Maritime employers typically comply by obtaining workers' compensation insurance from private sector insurance carriers.

Some maritime employers in Washington, however, had difficulty securing private sector insurance coverage because their employees were not a desirable risk. To address this problem, the legislature directed the OIC to "adopt rules establishing a reasonable plan to [e]nsure that workers' compensation coverage as required by [federal law] and maritime employer's liability coverage incidental to the workers' compensation coverage is available to those unable to purchase it through the normal insurance market" RCW 48.22.070(1). Accordingly, the OIC promulgated rules establishing the "Washington United States Longshore and Harbor Workers' [USL&H] Compensation Act assigned risk plan," otherwise known as "WARP." WAC 284-22-010. The purpose of WARP is to "promote a strong and healthy maritime industry, within Washington state, by ensuring the continued availability of workers' compensation coverage" WAC 284-22-020(1).

WARP is overseen by a governing committee that is comprised of the director of the Washington Department of Labor and Industries, insurers writing workers' compensation insurance, insurance brokers, organized labor leaders, and maritime employers. The governing committee's responsibilities include adopting operating procedures, defining the role and function of the servicing carrier, and hearing appeals

from aggrieved applicants.

WARP does not issue insurance policies. Instead, it contracts with a “servicing carrier”—an insurer designated by WARP to issue and administer longshore and harbor workers policies in Washington on behalf of WARP. During the period relevant to this case, there were two servicing carriers—first Eagle Pacific Insurance Company and then Kemper Insurance Company. Both servicing carriers delegated the performance of some of their contractual duties, for example collecting premiums and issuing policies, to a third party administrator, PointSure Insurance Services.

As required by law, the governing committee drafted operating procedures for WARP. The insurance commissioner was to approve the operating procedures if they provided “for the fair, reasonable, and equitable administration of the assigned risk plan for all concerned.” WAC 284-22-080. The operating procedures were submitted to and approved by the insurance commissioner. Section 2(d) of these operating procedures states that the servicing carrier is required to provide notice to the insured when a policy is close to expiring. “At least 45 days before the expiration of coverage send a notice of the impending expiration to the insured, and the producer. Such notice shall set out the procedure under which the policy will be renewed.” Administrative Record (AR) at 711. The meaning of “send a notice” is the main issue in this case.

The insured in this case was Unity HR, a staffing company with some maritime

employees. In March 2003, Unity's president, Troy Olney, obtained workers compensation insurance for his maritime employees through WARP. Unity qualified for WARP because it was rejected by two other insurers. Olney dealt directly and exclusively with WARP's third party administrator, PointSure, and its manager, Elizabeth Corwin. Olney paid the percentage of his premium required to bind coverage and then received invoices in the mail for the rest of the premiums, which he timely paid.

Before Unity's policy went through its first renewal, WARP changed servicing carriers from Eagle to Kemper. Olney received a letter dated January 14, 2005, from Corwin stating that Eagle was canceling its policy but that Kemper would automatically offer a replacement policy. Olney was confused by the letter and called Corwin. Corwin advised him that the policy was current and effective and that he did not need to worry.

On January 21, 2004, Corwin faxed Olney a letter that is at the center of this case. The first page of the fax states, "We are pleased to present this renewal quote on behalf of the Washington USL&H Assigned Risk Pool. This proposal is based on the expiring policy." AR at 517. The first page also states,

Please Note: this proposal is subject to the following terms and conditions:

- Receipt of net agency check prior to renewal date. Money must be received by 3/17 for coverage to remain in force.
- Washington USL&H Pool policies are Agency Bill.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE.

AR at 517. The second page of the fax is a quote sheet listing the down payment as

\$7,242 and setting forth the installment payment schedule. It did not include instructions on how to renew the policy. The third page of the fax is irrelevant to this case. Unity was never told that it would receive its only offer to renew and its only invoice for the renewal down payment together in a fax.

Corwin testified that she sent all three pages of the fax, and at the administrative hearing PointSure's copy of the three-page fax and a transmission confirmation sheet stating, "TRANSMISSION OK" was admitted into evidence. AR at 520. Olney, however, testified that he only received the second page of the fax. The hearing officer found Olney's testimony credible and without apparent bias. Another witness, insurance broker Michael Miller, testified about the reliability of faxes and their use in the insurance business.

Q. You say you use faxing in your business; is that right?

A. I do.

Q. Do you consider faxing the model?

A. No.

Q. Why is that?

A. Too many—I've had way too many failures over the last five years that—again, as I mentioned earlier to you, I have got too many situations where we will communicate with carriers with either submissions, with either insureds; and the information does not go through. . . .

. . . .

Q. . . . What kind of fax failures are you talking about? What have you encountered? (Inaudible)

A. Fax errors? I mean, we—we have—

Q. Yeah. What kind of—

A. We have pages either missing—they don't go through completely; and the fax machine says they do. I've had numerous office situations where we've been told that a fax has gone through, when in fact, even though we get a confirmation, it never has.

Verbatim Report of Proceedings (VRP) (Aug. 30, 2005) at 49–51. WARP did not object to any of this testimony or present

testimony establishing the reliability of faxes. The hearing officer found that Miller's testimony was credible and without bias.

The hearing officer found, "[I]n carrying out the renewal process which is the subject of this proceeding, communications by fax are not sufficiently reliable methods of communication." CP at 21 (finding of fact 25). She also found, "On or about January 21, 2004, Olney Unity HR received a one page document by fax" CP at 19 (finding of fact 15).

Olney took no action in response to the fax. The hearing officer found,

Olney reviewed [the fax] and believed that it was for the purpose of informing him about what he could expect for the upcoming year's term and that, prior to his Unity HR's coverage lapsing for nonpayment for this new term year he Unity HR would receive an invoice which would be the actual invoice which he should pay, just as he Unity HR had received invoices from PointSure for prior installment payments during the previous term of insurance.

CP at 18 (finding of fact 15). Unity's policy lapsed on March 18, 2004, but Unity was not sent notice that the policy had lapsed.

On April 5, 2004, one of Unity's employees was injured. Olney called Corwin on April 7 to inform her that Unity would be making a claim. Corwin told Olney that Unity's policy had lapsed and that there was no coverage. Olney asked her to backdate coverage, but she told him that she had no authority to do so and suggested that he call Charles Glass, WARP's director. Corwin then called Glass to explain the situation, and he agreed that there was no basis to backdate coverage. Glass agreed to reinstate coverage as of April 7, and Unity paid the premium that same day.

Unity appealed WARP's decision to refuse to backdate coverage to the governing committee, which affirmed

WARP's decision. Unity then appealed to the OIC and a two-day hearing was held before a hearing officer. The hearing officer made extensive findings of fact and concluded, "[I]t is not reasonable for PointSure/Kemper to conduct its invoicing by fax rather than by, or in combination with, U.S. Mail or other more reliable means. CP at 22 (finding of fact 26).

The hearing officer reversed the governing committee's decision and granted Unity's request to backdate coverage. WARP moved for reconsideration. In response, the hearing officer concluded that there was no sufficient basis to change its findings and conclusions other than crossing out "Olney" in certain findings and replacing it with "Unity HR." It also gave a lengthy written response to the arguments WARP made in its motion. WARP appealed to the superior court, which affirmed. WARP now appeals to this court.

Analysis

Deference to Agency Interpretation

The parties disagree about whether the hearing officer's interpretation of WARP's operating procedures is entitled to deference. Washington cases state that in the context of insurance, "although a commissioner cannot bind the courts, the court appropriately defers to a commissioner's interpretation of insurance statutes and rules." Credit Gen. Ins. Co. v. Zewdu, 82 Wn. App. 620, 627, 919 P.2d 93 (1996); see also Retail Store Employees Union, Local 1001 v. Wash. Surveying & Rating Bureau, 87 Wn.2d 887, 898, 558 P.2d 215 (1976) ("We may place greater reliance than usual

upon an administrative statutory interpretation in this case because the [Insurance] Commissioner has been entrusted with very broad discretion and responsibility”).

WARP argues that the hearing officer’s final order is not an agency interpretation. We reject this contention because the hearing officer acted with authority delegated from the insurance commissioner. See WAC 284-02-070(2)(c)(i) (“The insurance commissioner may delegate the authority to hear and determine the matter and enter the final order under RCW 48.02.100 and 34.05.461 to a presiding officer”) and RCW 48.02.100 (“Any power or duty vested in the commissioner by any provision of this

code may be exercised or discharged by any deputy, assistant, examiner, or employee of the commissioner acting in his name and by his authority.”).

WARP also argues that the hearing officer’s legal conclusions are not entitled to deference because section 2(d) of the operating procedures is not ambiguous. WARP cites many cases for the rule that deference to an administrative agency’s interpretation of a statute is entitled to deference only when the statute is ambiguous. See, e.g., Arco Prods. Co. v. Utils. & Transp. Comm’n, 125 Wn.2d 805, 810, 888 P.2d 728 (1995) (“[D]eference to an agency’s interpretation of a statute will be given only when the statute is ambiguous”) and St. Martin’s Coll. v. Dep’t of Revenue, 68 Wn. App. 12, 16, 841 P.2d 803 (1992) (citation omitted) (“Appellate courts exercise de novo review over legal judgments of administrative tribunals. Deference is generally given to an agency’s view

of the law in construing ambiguous statutes within the agency's area of expertise; absent such ambiguity, this court is entitled to substitute its judgment on legal issues for those of the administrative tribunal.”). In this case, however, the hearing officer interpreted a provision of WARP's operating procedures, not a statute. And WARP ignores the case cited above specific to the OIC that states, “[T]he court appropriately defers to a commissioner's interpretation of insurance statutes and rules.” Zewdu, 82 Wn. App. at 627 (emphasis added).

In sum, the hearing officer's interpretation of the operating procedures is entitled to deference because she acted with the authority delegated from the insurance commissioner in making her final order and she interpreted operating procedures that were approved by the OIC. But we are not bound by the hearing officer's legal conclusions. Zewdu, 82 Wn. App. at 627. Under the Administrative Procedure Act (APA), “The error of law standard ‘allows the reviewing court to essentially substitute its judgment for that of the administrative body, though substantial weight is accorded the agency's view of the law.’” Premera v. Kreidler, 133 Wn. App. 23, 31, 131 P.3d 930 (2006) (emphasis added) (quoting Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 325, 646 P.2d 113 (1982)).

Interpretation of Section 2(d)

We next consider WARP's contention that the hearing officer erroneously interpreted section 2(d) of the operating procedures. Given that substantial evidence supports the hearing officer's finding that faxes are unreliable and the deference owed

to her interpretation of the operating procedures, we decline to disturb her conclusion that PointSure's procedure for giving notice under section 2(d) was unreasonable. Although the hearing officer's order included other grounds as well, we need not reach these issues because we resolve this case by affirming her conclusion that PointSure failed to send Unity reasonable notice.

Under the APA, "[t]he court shall grant relief from an agency order . . . if it determines that: . . . The order is not supported by evidence that is substantial when viewed in light of the whole record before the court . . ." RCW 34.05.570(3)(e). WARP has "[t]he burden of demonstrating the invalidity of agency action . . ." RCW 34.05.570(1)(a). For an order to rest on substantial evidence, there must be evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. Heinmiller v. Dep't of Health, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). The substantial evidence standard is "highly deferential" to the agency fact finder. Arco Prods. Co. v. Utils. & Transp. Comm'n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The evidence should be viewed in the light most favorable to the party that prevailed before the administrative fact finder. City of Univ. Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

The hearing officer's conclusion that fax is not a sufficiently reliable means of communication is based on substantial evidence. First, Olney testified that he received only the second page of the January 21 fax. Second, Miller testified that faxes were unreliable. Most importantly, Miller explained that even when a fax machine reports

that a fax was successfully transmitted, sometimes the fax does not transmit. WARP did not object to Miller's testimony or present testimony establishing the reliability of faxes. While there was evidence that Unity received all three pages of the fax and the hearing officer could have concluded that faxes are sufficiently reliable, "an appellate court will not substitute its judgment for that of the trial court even though it might have resolved the factual dispute differently." Doe v. Boeing Co., 121 Wn.2d 8, 19, 846 P.2d 531 (1993) (quoting Beeson v. Atlantic-Richfield Co., 88 Wn.2d 499, 503, 563 P.2d 822 (1977)).

Given that this finding is supported by substantial evidence, the hearing officer did not "erroneously interpret" section 2(d). RCW 34.05.570(3)(d). Section 2(d) requires the servicing carrier to "send notice," but does not state what type of notice is sufficient. The parties agree that notice must be reasonable. The hearing officer did not err in concluding that PointSure's procedure for sending notice of an offer to renew was unreasonable because there was substantial evidence that faxes are not sufficiently reliable.

In determining that sending by fax was insufficient, the hearing officer consulted RCW 48.18.2901(1)(b), which supports her conclusion. WARP acknowledges that this statute is relevant to interpreting section 2(d) because it concerns offers to renew.

Under this statute, the insurer is not required to renew a policy if,

[a]t least twenty days prior to its expiration date, the insurer has communicated, either directly or through its agent, its willingness to renew in writing to the named insured and has included in that writing a statement of the amount of the premium or portion thereof required to be paid by the insured to renew the policy, and the insured fails to discharge when due his or her obligation in

connection with the payment of such premium or portion thereof.

RCW 48.18.2901(1)(b) (emphasis added). “Communicate” implies that information is received. Webster’s Third New International Dictionary 460 (1993) (defining “communicate” as “to make known; inform a person of; convey knowledge or information of”). Given that RCW 48.18.2901(1)(b) requires “communication” of an offer to renew, the hearing officer did not err in concluding that sending an offer to renew by fax was unreasonable because of the risk of nonreceipt.

The hearing officer’s interpretation of section 2(d) is also supported by the importance of the notice of an offer to renew. As Unity explains in its brief, “WARP offered no evidence that demonstrate[s] that service by facsimile is so reliable that the risk of a catastrophic loss should hinge on the single fax transmission of a single document.” Br. of Appellee/Intervener Unity HR at 25. The offer to renew was especially important because Unity had been rejected by two other insurers and relied on WARP for coverage.

The hearing officer’s interpretation of section 2(d) is also supported by the fact that WARP’s other communication practices all involve use of mail. The hearing officer noted that all communications between WARP and its servicing carrier were to be made by certified mail. CP at 20 (finding of fact 22). Though PointSure sent all invoices to its insureds by mail, it gave Unity no notice that its offer to renew and invoice for its renewal down payment would be sent together in a fax. And when an insured fails to pay a premium, the operating procedures require the servicing carrier to

give the insured 30 days' written, mailed notice, with an opportunity to cure this deficiency. In light of the fact that these other notices, which are arguably less important than an offer to renew, had to be sent by mail, the hearing officer did not err in determining that sending a fax was an unreasonable interpretation of section 2(d)'s requirement that the servicing carrier "send a notice."

Finally, the hearing officer's interpretation of section 2(d) is supported by the policy considerations behind the creation of WARP. WARP exists to "promote a strong and healthy maritime industry, within Washington state, by ensuring the continued availability of workers' compensation coverage" WAC 284-22-020(1). And WARP's operating procedures must "provide for the fair, reasonable, and equitable administration of the assigned risk plan for all concerned." WAC 284-22-080(1). The hearing officer interpreted section 2(d) in a manner consistent with these considerations.

Other Assignments of Error

WARP argues that the hearing officer erroneously used the notice of nonrenewal statute, RCW 48.18.2901(1)(a), as a guide in interpreting section 2(d).

That statute provides,

(A) The insurer must deliver or mail written notice of nonrenewal to the named insured at least forty-five days before the expiration date of the policy; and

(B) The notice must include the insurer's actual reason for refusing to renew the policy.

RCW 48.18.2901(1)(a)(i). The hearing officer did not err by merely considering RCW 48.18.2901(1)(a) in determining the meaning of “send a notice” in section 2(d). She did not require the servicing carrier to conform to RCW 48.18.2901(1)(a). And while the notice of offer to renew statute, which the hearing officer also considered, is more applicable to section 2(d), WARP fails to explain why the hearing officer’s order should be reversed merely because she also considered the notice of nonrenewal statute in interpreting section 2(d).

WARP also argues that the hearing officer ignored the distinctions between the notice procedures for offers to renew, cancellation, and nonrenewals. While we recognize the differences in notice procedures in the statutes, the hearing officer was required to interpret the notice requirements in WARP’s operating procedures. Section 2(d) requires the servicing carrier only to “send a notice” but does not set forth what type of notice is acceptable. As explained above, the hearing officer did not err in her interpretation of section 2(d), especially given its finding that faxes are not sufficiently reliable and the deference owed to the OIC when interpreting its own rules.

WARP’s next contention is that the hearing officer erred by relying on the practices in United States longshore and harbor workers’ plans from other states in determining what notice was reasonable under section 2(d). WARP does not cite any case or statute that prohibits the OIC from taking into consideration practices in similar circumstances when evaluating what is a reasonable notice procedure. Additionally, the hearing officer’s order withstands

review even without its reliance on the practices in other states because its finding that faxes are not sufficiently reliable is based on substantial evidence.

Finally, WARP argues that the additional notice requirements in the hearing officer's final order are arbitrary and capricious, erroneous, and outside the officer's authority. Contrary to WARP's representations, the order does not proscribe a process the servicing carrier must use for notices of offers to renew. Rather, it sets forth several options that would be considered reasonable, such as sending notice by mail. This portion of the order was not arbitrary and capricious because "[w]here there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." Heinmiller v. Dep't of Health, 127 Wn.2d 595, 609, 903 P.2d 433 (1995) (quoting Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 695, 658 P.2d 648 (1983)). And it is not legally erroneous because after concluding that sending notice by fax was unreasonable, the hearing officer merely took the next step of suggesting some procedures that would be considered reasonable. Nor is it outside the hearing officer's authority because she acted with authority delegated from the OIC in determining the meaning of section 2(d).

Conclusion

We affirm because substantial evidence supports the finding that sending notice by fax is unreliable and, given this finding, the hearing officer did not err in concluding that sending notice of an offer to renew by fax is unreasonable.

For the foregoing reasons, we affirm.

Jan, J.

WE CONCUR:

Eden, J.

Becker, J.