2012 IL App (2d) 110675-U
No. 2-11-0675
Order filed May 21, 2012
Modified upon denial of rehearing June 28, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CORPORATE SERVICES, INC.,	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-375
	)	
UNITED WISCONSIN INSURANCE COMPANY,	)	
	)	
	)	Honorable
	)	Edward J. Prochaska,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

RULE 23 ORDER

Held: On the parties' cross motions for summary judgment, the trial court properly granted summary judgment in favor of United Wisconsin Insurance Company because there was no evidence that the experience modifier used to calculate the premium was improper.

¶ 1 On October 22, 2010, plaintiff, Corporate Services, Inc., filed a two-count complaint against its insurer, United Wisconsin Insurance Company (United Wisconsin), seeking to recover allegedly overpaid worker's compensation insurance premiums. The crux of the complaint was that United Wisconsin applied an incorrect experience modification factor (experience modifier) in its

computation of the premium. The parties filed cross motions for summary judgment. The trial court disagreed that United Wisconsin had used an improper experience modifier, and it granted summary judgment in favor of United Wisconsin and denied Corporate Services' motion for summary judgment. Corporate Services appeals, and we affirm.

¶ 2 I. BACKGROUND

¶ 3 Corporate Services moved for summary judgment on March 1, 2011. The following evidence, which is undisputed, is derived from that motion. Corporate Services is an employment agency that staffs part-time and permanent positions in various businesses, and it is an interstate risk with risk exposure in Illinois and Wisconsin. United Wisconsin issued a workers' compensation policy (the policy) to Corporate Services for the one-year period of March 15, 2005, to March 15, 2006. The policy provided for an estimated premium and a final premium. The policy stated that the premium calculated at the beginning of the policy was an estimate, and that the final premium would be determined after the policy ended by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully applied. An experience modifier is one of several factors used to calculate the premium, and it is used to either increase or decrease the premium based on the insured's claim experience over the preceding years.

¶ 4 The experience modifier is calculated by the National Council on Compensation Insurance (NCCI), the largest provider of workers' compensation employee injury data and statistics in the nation. The Illinois Department of Insurance has designated NCCI as the licensed rating and statistical organization for insurance companies selling worker's compensation. United Wisconsin is a member of NCCI and adopted NCCI's Experience Rating Plan Manual (Manual). The Manual was incorporated into the policy. One of NCCI's functions is the calculation of an experience

modifier for an insured based on the statistical data of the insured's loss experience over the preceding 36 months.

¶ 5 At issue is the interpretation of Rule 4 of the Manual, entitled "Application and Revision of Experience Rating Modifications," which provides:

"C. TYPES OF EXPERIENCE RATING MODIFICATIONS

1. Preliminary Modifications

(Exception: MA)

A preliminary modification uses existing rating values that are expected to change pending regulatory action on a rate filing. The preliminary modification must be applied until the final experience rating modification is determined.

2. Final Modifications

(Exception: MA)

When a rating filing is approved in a state, the experience rating modification will be recalculated using the new rating values, and will become final. An experience rating modification may also be released originally as a final modification if there were no pending rate filings at the time the modification was released.

3. Contingent Modifications

(*Exception: IL*, MA, OR)

a. Explanation

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(1) A contingent modification is one that is missing some data, but still meets the minimum data requirement displayed in the Minimum Data Requirements Table.

(2) Contingent modifications for interstate risks must attain the minimum data requirements for each state meeting the intrastate premium eligibility levels.

(3) If an intrastate or interstate risk does not attain the minimum amount of data required, a modification will not be issued. *In such cases, a unity (1.00) factor applies*." (Emphases added.)

¶ 6 For an experience period of 36 months, 24 months of data is required to satisfy the Minimum Data Requirements Table. On December 21, 2004, NCCI issued an experience modifier of 1.51 for Corporate Services and referred to it as a "preliminary modification." For this "preliminary" experience modifier, NCCI utilized 36 months of data (from March 1, 2001, to March 1, 2004) for Corporate Services' operations in Illinois. For Corporate Services' operations in Wisconsin, however, NCCI utilized only 12 months of data. In other words, data from Wisconsin operations was missing for the periods of March 1, 2001, to March 1, 2002, and March 1, 2003, to March 1, 2004.

¶ 7 After calculating the "preliminary" experience modifier of 1.51 on December 20, 2004, NCCI revised the experience modifier three more times: on January 20, 2005; on November 16, 2005; and on July 21, 2006, which was after the March 2006 policy expired. Each of the subsequent revisions resulted in an experience modifier of 1.57, as opposed to 1.51.[1] In addition, the final July 21, 2006, experience modifier issued by NCCI utilized an additional 12 months of data (from March 1, 2001, to March 1, 2002) from Corporate Services' operations in Wisconsin, thus satisfying the 24 months' minimum data requirement for an experience period of 36 months.

[1]United Wisconsin ultimately charged Corporate Services a premium based on the 1.51 experience modifier and never applied the revised experience modifier of 1.57. Therefore, the 1.57 experience modifier is not the figure at issue on appeal.

¶ 8 The following evidence is disputed. According to Corporate Services, based on the missing data for Wisconsin operations, the 1.51 experience modifier issued on December 21, 2004, was not only "contingent" under Rule 4 of the Manual, which is prohibited under Illinois law, it failed to meet the minimum data requirements under Rule 4 of the Manual, meaning that a unity factor of 1.00 applied. Because the 1.57 experience modifier was also missing data from the Wisconsin operations, Corporate Services argued that that experience modifier was "contingent" as well, and thus in contravention of Illinois law.

¶ 9 Corporate Services argued that United Wisconsin breached the contract by applying a "contingent" experience modifier of 1.51 rather than a unity factor of 1.00 to calculate the premium. Because the policy required United Wisconsin to perform an audit after the expiration of the policy in order to calculate the final premium, Corporate Services argued that United Wisconsin was obligated to correct any mistakes or errors that were calculated in the estimated premium. According to Corporate Services, United Wisconsin should have corrected the 1.51 experience modifier by applying a unity factor of 1.00 when calculating the final premium. Corporate Services argued that due to United Wisconsin's use of the improper experience modifier of 1.51, it overpaid the premium by $131,321. Corporate Services argued that it was entitled to a refund of $131,321, plus prejudgment interest.

¶ 10 Relying on the same rationale, Corporate Services also argued that United Wisconsin violated section 462b of the Workers' Compensation and Employers' Liability Rates (the Workers' Compensation Rates Act), which provides that insurance companies:

> "shall apply correct classifications, payrolls and other factors of a rating system to compute premiums. If the application of incorrect classifications, payrolls or any other factors of a

> rating system results in the payment by an insured of premiums in excess of the premiums that would have been paid utilizing the correct applications of classifications, payrolls or other factors of a rating system, the insurer shall refund to the insured the excessive premium paid for the period during which the incorrect application of classifications, payrolls, or other factors of a rating system were applied." 215 ILCS 5/462(b) (West 2010).

¶ 11 United Wisconsin filed a cross motion for summary judgment on March 31, 2011. United Wisconsin disputed Corporate Services' allegation that NCCI's experience modifier of 1.51 was "contingent." Instead, United Wisconsin pointed out that NCCI itself classified the 1.51 experience modifier as a "preliminary" experience modifier pending a rate filing. According to United Wisconsin, Illinois allowed the use of preliminary experience modifiers in calculating premiums, and the Manual required that a preliminary experience modifier be applied until the final experience modifier was determined. United Wisconsin thus argued that it followed the rules set forth in NCCI's Manual.

¶ 12 United Wisconsin also attached to its motion an affidavit of Joanne M. Kline, the Director of Underwriting for United Heartland, a business that was underwritten by United Wisconsin. In Kline's affidavit, she averred that the corporate underwriting department followed NCCI's Manual in calculating the premium; that NCCI calculated an experience modifier of 1.51 and submitted it to United Wisconsin; that United Wisconsin applied the experience modifier of 1.51; that Illinois allowed the use of preliminary experience modifiers; and that by the time NCCI produced a final experience modifier of 1.57, United Wisconsin had already issued the policy and charged Corporate Services the lower amount of premium based on the 1.51 experience modifer. For this reason,

United Wisconsin never charged Corporate Services a premium based on the higher 1.57 experience modifier.

¶ 13 The court held a hearing on the parties' motions. Corporate Services argued that both the 1.51 and 1.57 experience modifiers were contingent, meaning that neither of them could be used to calculate the premium. In addition, Corporate Services argued that an experience modifier could be both "preliminary" and "contingent" under the Manual.

¶ 14 United Wisconsin responded that it was bound to follow NCCI's experience modifier of 1.51 and that Corporate Services' complaint was really with the Department of Insurance and the legislature. According to United Wisconsin, the fact that an experience modifier could fit multiple descriptions did not allow the court to substitute its judgment for the judgment of the legislature or the Department of Insurance when it vested that authority in NCCI. United Wisconsin argued that NCCI wrote the Manual and applied the Manual; thus, NCCI had the discretion to classify the 1.51 experience modifier as "preliminary." Counsel for United Wisconsin also explained that the failure to apply the final experience modifier of 1.57 was either a mistake or intentional; he was not sure. However, United Wisconsin's use of the 1.51 experience modifier resulted in a significant financial benefit to Corporate Services, meaning that Corporate Services' attempt to receive a refund was disingenuous.

¶ 15 Corporate Services rebutted United Wisconsin's position by arguing that "what NCCI says is not what goes and they are not the pros." Rather, the "pros" were the insurance companies, and NCCI was just a clearinghouse that received data from the insurance companies, ran it through a computer, and spit out a number. Corporate Services argued that United Wisconsin could not "skirt

around" its use of a "contingent" experience modifier, which is prohibited in Illinois, by labeling it "preliminary."

¶ 16 The trial court noted that both parties were approaching the issue from two completely different directions. It framed the issue as whether the preliminary (1.51) and final (1.57) experience modifiers in this case were also contingent. The court found "as a matter of law that they were not contingent because the contingent section of the [M]anual doesn't apply under this circumstance." The court stated:

> "In following the rules set forth in the [M]anual, United Wisconsin applied the preliminary [experience modifier] designated by NCCI to calculate the premium by using NCCI's preliminary [experience modifier]. That's what was done in this case. Illinois does not allow the contingency [experience modifier] and that wasn't used in this case. I don't think it's part of the analysis. Corporate Services has not provided any evidence that challenges United Wisconsin's ability to use NCCI's calculation of the premiums in this particular case. I think Corporate Services' main argument really deals with a section of the manual dealing with contingency modifications that really doesn't apply under the facts and circumstances of this case. I understand the arguments. They really are - I think there is a disconnect between the arguments presented from both sides, but I'm going to find that United Wisconsin is entitled to summary judgment in its favor. I'm going to grant United Wisconsin's motion for summary judgment, deny Corporate Services[']motion for summary judgment, and those are final orders."

¶ 17 Corporate Services timely appealed.

¶ 18 II. ANALYSIS

¶ 19 Summary judgment is appropriate only where the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 370 (2007). When parties file cross-motions for summary judgment, the court is invited to decide the issue as a matter of law; however, summary judgment is not appropriate if factual questions regarding a material issue exist. *Chicago Transit Authority v. Clear Channel Outdoor, Inc.*, 366 Ill. App. 3d 315, 323 (2006). The trial court's grant of summary judgment is subject to *de novo* review. *Rich*, 226 Ill. 2d at 370.

¶ 20 The *de novo* standard of review also applies to the construction of an insurance policy. *Rich*, 226 Ill. 2d at 371. An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). Our primary objective is to give effect to the intention of the parties, as expressed in the policy language. *Id*. An insurance policy is to be construed as a whole, giving effect to every provision, and taking into account the type of insurance provided, the nature of the risks involved, and the overall purpose of the contract. *Rich*, 226 Ill. 2d at 371. If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning, and the policy will be applied as written, unless it is against public policy. *Id*.

¶ 21 The policy in this case provided that "[a]ll premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications." The Workers' Compensation Rates Act requires every insurance company to file its manual of classifications, rules, rates, and rating plans with the Director of Insurance. 215 ILCS 5/457 (West 2010). An insurance company may also

satisfy this filing requirement by adopting the manual of a licensed rating organization (*id*.), such as the NCCI, whose Manual was incorporated into the policy at issue. NCCI's role in the calculation of the premium was explained by the Seventh Circuit:

> "Premiums for workers[']compensation insurance are calculated using three independent factors. First, the insurance company must determine the correct classifications for the various jobs performed by the insured's employees. Each type of job has an advisory rate set by [NCCI], which reflects the relative riskiness of that position. The second factor is the amount of payroll in each job classification. The premium's final element is the experience modifier, a number determined by [NCCI] that compares an employer's past claim history to the past claim history of the average employer in that job classification. If a company has a claims history that is average in its field, the experience modifier will be one. As the number of claims increases, so does the modifier (and by extension, the premium). *** The insurance company calculates the premium by multiplying the job classification rate by the payroll and that amount by the experience modifier." *U.S. v. Leahy*, 464 F.3d 773, 782 (7th Cir. 2006).

¶ 22 On appeal, Corporate Services argues that due to United Wisconsin's improper use of a contingent experience modifier in calculating the premium, it overpaid. According to Corporate Services, an experience modifier can be both "preliminary" *and* "contingent" because whether an experience modifier is "preliminary" or "final" depends on the rating values, whereas whether an experience modifier is "contingent" depends on the amount of data provided to NCCI. Corporate Services thus argues that the criteria for determining whether an experience modifier is preliminary or contingent is separate and distinct. Based on its argument that the 1.51 experience modifier was

contingent, Corporate Services argues that that figure should not have been applied, but rather a unity factor of 1.00 should have been applied.

¶ 23 We disagree that Corporate Services has met its burden of showing that the 1.51 experience modifier used in this case was improper. It was up to the NCCI, which wrote and applied the Manual at issue here, to calculate the 1.51 experience modifier. In issuing the 1.51 experience modifier, the NCCI labeled it a "preliminary modification," as opposed to a contingent modification. As United Wisconsin argues, Illinois does not prohibit the use of preliminary experience modifiers. While Corporate Services argues that an experience modifier can be both "preliminary" and "contingent" under the Manual, it offers no support for this theory. We do not pretend to know how the NCCI applies its various designations of preliminary, final, and contingent modifications. But we do know that the NCCI endeavored to label its initial 1.51 experience modifier as "preliminary" and that the 1.51 experience modifier fits the definition of a "preliminary" experience modifier. Therefore, Corporate Services has not shown that the 1.51 experience modifier was improper.

¶ 24 This is not to say that an experience modifier can never be challenged. In an out-of-state case, *Travelers Indemnity Co. of Illinois v. Staff Right, Inc.*, 2006 WI 59, 714 N.W.2d 219, the insured challenged its insurance company's application of an experience modifier issued by NCCI. In particular, the insured argued that the insurance company improperly applied NCCI's experience modifier for its Wisconsin operations to its Illinois operations. *Id.* ¶ 6. Though the trial court ruled that the insured had not met its summary-judgment burden because it had not demonstrated either how the 2.83 experience modifier was too high or how the insurance company had discretion to apply a different experience modifier than the one set by NCCI, the reviewing court reversed. *Id.* ¶ 1,7. What separates the case at bar from *Travelers Indemnity* is the evidence the insured provided

in support of its argument. In *Travelers Indemnity*, the insured submitted two affidavits: one from a Manager in the Experience Rating Department of NCCI that averred that he had reviewed NCCI's records, and one from a Vice President of the Wisconsin Workers' Compensation Rating Bureau. *Id*. ¶ 6. Together, the affidavits demonstrated that the 2.83 experience modifier issued by NCCI applied *only* to the insured's Wisconsin operations, not the insured's Illinois operations, despite the insurance company's argument to the contrary. *Id*. Therefore, the reviewing court found that the affidavits were sufficient to defeat the insurance company's motion for summary judgment. *Id*. ¶ 12.

¶ 25 In this case, Corporate Services has provided no such evidence that United Wisconsin misapplied NCCI's experience modifier, or that NCCI violated its own Manual in issuing either the 1.51 preliminary experience modifier (or the revised 1.57 experience modifier). See *Schroeder v. Winyard*, 375 Ill. App. 3d 358, 368 (2007) (while the plaintiff is not required to prove its case at the summary judgment stage, it must provide a factual basis arguably entitling it to judgment in its favor). Therefore, Corporate Services has not shown a breach of the policy or a violation of the computation of premiums under section 462b of the Workers' Compensation Rates Act. Accordingly, the trial court properly denied Corporate Services' motion for summary judgment and granted it in favor of United Wisconsin.

¶ 26 III. CONCLUSION

¶ 27 For the aforementioned reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 28 Affirmed.