

COPY

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

IN THE MATTER OF:) PROPOSED ORDER
)
KAREN I. KIRSCH, Petitioner)
)
DEPARTMENT OF CONSUMER AND) OAH/Agency Case No.: 08-07-007
BUSINESS SERVICES, INSURANCE)
DIVISION, Respondent)
)
REGENCE BLUECROSS)
BLUESHIELD OF OREGON,)
Intervenor)
)

HISTORY OF THE CASE

By letter dated April 11, 2008, the Insurance Administrator for the Department of Consumer and Business Services, Insurance Division (Department) approved the Individual 2008 Third Quarter Rate Filing filed by Regence BlueCross BlueShield of Oregon (Regence). The Department approved Regence's request for a 25.9 percent rate increase for its individual health insurance line. On July 2, 2008, the Department received a petition for hearing from Petitioner Karen Kirsch pursuant to ORS 731.240, challenging the Department's April 11, 2008 approval of Regence's rate filing. On or about July 31, 2008, the Department referred the hearing request to the Office of Administrative to schedule and conduct a hearing.

On August 12, 2008, the Department received from Regence a petition requesting to participate as a party in this matter. Petitioner did not oppose the petition and, on August 18, 2008, the Department's Director granted Regence's request.

The matter was assigned to Administrative Law Judge Alison Greene Webster of the Office of Administrative Hearings. On or about October 15, 2008, the Department, Petitioner and Regence entered into a Stipulated Protective Order. Prehearing conferences were held on November 14, 2008, January 5, 2009 and January 30, 2009. During these conferences, Assistant Attorney General Judith Anderson represented the Department. Attorney Charlie Ringo represented Petitioner and Attorney David White represented Regence.

The hearing convened on February 4 and 5, 2009, in Tualatin, Oregon, before Administrative Law Judge Webster. Assistant Attorney General Anderson represented the

Department. Attorney Ringo represented Petitioner Kirsch and Attorney White represented Regence.

The following witnesses testified at the hearing: Gayle Woods, Insurance Division Operations Manager; Scott Fitzpatrick, Insurance Division Life and Health Actuary; David Ball, Insurance Division Life and Health Actuary; Karen Kirsch; Larry Kirsch, Manager, Health Economics; Tom Wortman, Vice President of Actuarial Pricing, Regence; James Swenson, Technical Consultant to the Insurance Division.

The record remained open for submission of additional exhibits and written closing argument. The record closed on April 20, 2009, upon receipt of the Department's and Regence's written closing arguments.

PREHEARING RULINGS

Prior to the scheduled hearing date, Petitioner filed a motion for summary determination, asserting that the Department's decision to approve Regence's rate increase must be disallowed and rescinded because, in approving the rate filing, the Department did not issue findings of fact and conclusions of law in accordance with ORS 183.470(2). The motion was denied on a determination that Department's decision to approve the rate increase was not a "final order" under ORS 183.470 that required findings of fact and conclusions of law.

Also prior to the hearing, Petitioner served subpoenas on Cory Streisinger, Director of the Department of Consumer and Business Services, and Carl Lundberg, Former Insurance Division Deputy Administrator, seeking their testimony as witnesses at the hearing. The Department filed motions seeking to quash these subpoenas, asserting that the testimony of these two Department witnesses would lead to inappropriate examination of administrative decision makers. Petitioner filed memorandums in opposition to the Department's motions.

During the January 30, 2009 prehearing conference, the ALJ the denied the motions to quash, finding that, in the absence of a written record explaining the basis for the Department's approval, it was appropriate to examine the Department's decision makers themselves. The ALJ's decision was based upon *Citizens to Preserve Overland Park v. Volpe*, 401 U.S. 402 (1971) and *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003). On February 2, 2009, the Department requested immediate review of the ALJ's ruling. On February 4, 2009, Teresa Miller, Acting Administrator of the Department's Insurance Division, set aside the ALJ's ruling, and granted the Department's motions. The Department determined that Petitioner failed to present compelling reasons why the two of the Department's top administrative decision makers should be required to testify at the hearing. The subpoenas were quashed, and neither Streisinger nor Lundberg testified at the hearing.

ISSUES

1. Whether the Department was required to make written findings of fact and conclusions of law in connection with its approval of Regence's Individual 2008 Third Quarter Rate Filing.
2. Whether the Department applied the applicable legal standards and conducted a proper review when it approved Regence's Individual 2008 Third Quarter Rate Filing.
3. If not, what is the appropriate remedy for the Department's improper review?

EVIDENTIARY RULINGS

The Department's Exhibits A1 through A18, Regence's Exhibits II through II4 and Petitioner's Exhibits P1 through P55 were admitted into the record. Regence's Exhibits I13 and I14 were admitted over Petitioner's relevancy objections.

FINDINGS OF FACT

1. On February 28, 2008, Regence submitted a rate filing (SERFF Tracking No. RGAC-125513025) using the Department's electronic system for rates and forms filing (SERFF). Regence sought a 10.3 percent increase on its individual health benefit plan rate effective July 1, 2008 (Individual 2008 Third Quarter Rate Filing). The requested 10.3 percent quarterly rate increase amounted to an average 26 percent increase over the prior year. (Exs. A3 and A4.)
2. The Department assigned the rate filing to Scott Fitzpatrick, a Life and Health Actuary in the Department's Insurance Division. Fitzpatrick reviewed Regence's rate filing, and determined that Regence could only justify a 2 percent quarterly increase. He emailed his worksheet to coworker David Ball, and asked that Ball check his analysis. (Ex. P53.)
3. Fitzpatrick also conferred with Scott Kipper, the Department's Insurance Administrator. On March 3, 2008, through the SERFF system, Fitzpatrick issued an Objection Letter to Regence. Fitzpatrick wrote:

The Oregon Insurance Division has completed its actuarial review of the Company's submission justifying the requested 10.3% rate increase on their Individual Health Insurance effective July 1st, 2008. The Division feels strongly that only a 2.0% increase can be actuarially justified. The major difference in results obtained by the Division and the Company can be narrowed down to two sources: 1) target loss ratio, and 2) accounting for quarterly rate increases rolled forward the past three quarters.

In the paragraphs that followed, Fitzpatrick outlined his concerns about the change in Regence's target loss ratio.¹ He also noted that the annual rate increase that could be actuarially justified was 16.5 percent. He added that, should the 2 percent increase be acceptable to Regence, then it could resubmit the revised documentation and the Department would quickly approve the rate filing. (Ex. A3 at 4; test. of Fitzpatrick.)

4. On March 10, 2008, representatives from Regence met with representatives from the Department, including Fitzpatrick, Ball, Kipper and Deputy Insurance Administrator Lundberg, to discuss the rate filing. Regence provided information and documentation in support of its requested rate increase. Regence presented financial projections for the individual line of business based on three different rate increase scenarios. Regence asserted that that the requested rate increase was necessary to sustain the individual health insurance line. Regence contended that even with a 10.3 percent rate increase, the product line would run at a loss in 2008. (Test. of Wortman; Ex. P17; Ex. I11.) During the meeting, Regence also agreed to provide the Department with further information, including copies of the projections, charts and tables it relied upon at the meeting. (Ex. A3 at 6.)

5. On March 14, 2008, through the SERFF system, Regence submitted a response to the Department's Objection Letter. Regence wrote: "Per our meeting on Monday, March 10th, we are rejecting DCBS's proposed rate increase. We will continue to work with DCBS to reach an agreement for the July 2008 rate change." (Ex. A3 at 5.) That same day, Regence submitted copies of the graphs and financial projections it used during the March 10, 2008 meeting with the Department. (Exs. A14 and I6.)

6. In the updated graphs and projections Regence submitted to the Department following the March 10, 2008 meeting, Regence charted its historical and projected claims costs, incurred and forecasted losses and the rate history of the individual health insurance line for the previous three years. Regence also updated the graphs and tables by changing the rate increase assumption to 16.5 percent for those policies renewing in the third quarter of 2008 and updated the future quarterly rate changes to equal the trend or 2.94 percent per quarter. (Ex. I6.)

7. On March 18, 2008, Fitzpatrick, Ball, Kipper and Lundberg met to discuss the rate filing. They discussed the premium rate increases on the various plan levels and the number of policyholders that would be impacted at each level. They agreed to allow Regence a larger quarterly increase, to 4 percent, with the expectation that if this was not enough to restore profitability, the company would likely receive a rate increase exceeding trend the following year. (Ex. I11; test. of Fitzpatrick.)

8. After Fitzpatrick reviewed the additional information that Regence had provided, he saw that Regence was losing money on its individual health line each year, with projections out

¹ In simple terms, the "target loss ratio" is the amount of incurred claims divided by earned premiums. It is also equal to one minus the retention, where retention (*i.e.*, commissions to be paid, business costs, claims administrative expenses, profit, etc.) is stated as a percentage. (Test. of Fitzpatrick.)

to 2010. Given the circumstances, Fitzpatrick came to believe that the change in Regence's target loss ratio was acceptable.² (Test. of Fitzpatrick.)

9. On March 24, 2008, the Department, through Fitzpatrick, issued an updated Objection Letter. The Department asked Regence to respond to certain concerns regarding the rate filing. The Department then offered to approve a 4 percent quarterly rate increase. Fitzpatrick wrote:

The Oregon Insurance Division has reviewed the Company's March 14, 2008 response to the Divisions March 3rd, 2008 Objection Letter. This included the updated financial projections provided to the Insurance Administrator in response to his request during the March 10th, 2008 meeting with the Company's representatives in our Offices.

The Division will not approve the requested 10.3% quarterly rate increase, because this compounded with the prior 5.0%, 3.6% and 5.0% rate increases results in an annual rate increase of 25.9%.

The Division will approve a 4.0% quarterly rate increase effective July 1st, 2008. This results in an annual rate increase of 18.7%. Approximately one-fifth of those enrolled for coverage will also move to the higher premium of the next five-year age band, so the Company will also receive approximately an additional 3% premium for the aging of the current enrollment.

The Division is attaching the new premium rates at the allowable rate increase, rounded to the nearest dollar, so that there can be no misunderstanding between the Division and the Company.

(Ex. I7.)

10. On April 1, 2008, Regence rejected the Department's offer of a 4.0 percent quarterly rate increase. Through the SERFF system, Regence issued the following response: "The Company is not willing to accept your proposal. We will be in contact with DCBS shortly to further discuss this filing." (Ex. P37.)

11. On April 8, 2008, Fitzpatrick emailed his coworker Ball asking that Ball review excel worksheets he had created regarding Regence's request for the 10.3 percent quarterly rate increase. In the spreadsheets, Fitzpatrick modeled different options available to Regence's individual policy holders to reduce the impact of the proposed rate increase. Using the subject line "Gaming the System," Fitzpatrick wrote:

² According to guidelines published by the National Association of Insurance Commissioners (NAIC), any incurred target loss ratio over 55 percent is acceptable. Fitzpatrick understood that rate approval standards set out in ORS 742.005 implicitly incorporated the NAIC guidelines as the minimum acceptable incurred loss ratio. Although Fitzpatrick was concerned that Regence had adjusted its target loss ratio to increase retention by 10 percent in the Individual Third Quarter 2008 rate filing, the new target loss ratio was still well above the minimum acceptable level. (Test. of Fitzpatrick).

David,

See if you like what I put together. It shows how the 26% receivers will be able to pencil out the increase, but it will not be favorable to go from a \$500 deductible (if my logic is correct). See "TakeaHigherDeductible.xls" attached.

I also have a HopDown.xls which shows how you can avoid the 26% by going from Premier to Plus, Plus to Basic, or a double step down form Premier to Basic.

Scott F.

(Ex. P39; test. of Fitzpatrick.)

12. Sometime between April 1, 2008 and April 11, 2008, Regence's Chief Executive Officer and other Regence executives met with Department Director Streisinger, Insurance Administrator Kipper and Deputy Administrator Lundberg to discuss Regence's rate filing. Regence contacted Streisinger because the company was not successful negotiating the rate increase with the Department's actuaries. During the meeting, Regence discussed the circumstances leading to its request for a quarterly rate increase, and explained why it needed the increase. The Department representatives questioned the impact of the increase on Regence's members, and Regence advised that it could not continue to sustain the losses on the individual health insurance line. (Test. of Wortman.)

13. The financial information and projections that Regence provided to the Department indicated that Regence had experienced losses on its individual health insurance line since 2006, and would likely continue to experiences losses on this line of business even with the proposed rate increase. (Ex. I6 at 6.) Regence argued that the rate increase was necessary to keep the product line's financial performance sound. Regence also asserted that the individual health line was extremely competitive and rates needed to increase to allow insurers to charge what it cost them to provide the coverage. Regence further noted that its average rate increases over the prior three years was moderate and consistent with or below the prevailing medical trend. (Test. of Wortman; Ex. I13 at 2.)

14. Prior to the meeting, Fitzpatrick had focused on Regence's overall financial position rather than the financial position of the individual health insurance line alone. Based on the information presented at the meeting, the Department's decision-makers agreed to consider the financial position of the individual health insurance line when making the decision to approve or disapprove the requested 10.3 percent quarterly increase. (Ex. I11; test. of Fitzpatrick.)

15. On or about April 9, 2008, through the SERFF system, Regence submitted to the Department a draft renewal letter it proposed to send to members regarding the rate increase in its individual line. (Ex. P42.)

16. On April 11, 2008, Fitzpatrick drafted a confidential memorandum titled "Reasons for Approval." Fitzpatrick set out the history of Regence's rate increases and decreases over the previous few years. He noted that after the Department initially found that a 2 percent quarterly

increase and an annual rate increase of 16.5 percent was justified for the current quarter, Regence came to the Department to explain why the full requested rate increase was necessary. Fitzpatrick wrote that when the Department agreed to approve a 4 percent quarterly increase for an 18.7 percent annual rate increase, Regence refused to accept this amount. Fitzpatrick then compared the requested 10.3 percent quarterly rate increase to Regence's claims trend, and discussed the company's stated target loss ratio. Looking at the company's overall performance, Fitzpatrick noted that the company's underwriting and investment gains have been quite small over the prior five years, "with a small loss of \$2.2 million for 2007, although their surplus is up 2.8% yearly and assets are up 7% yearly." Fitzpatrick also discussed the company's risk-based capital over the prior two years, compared to the industry average. Fitzpatrick concluded the memorandum with the following paragraph:

Their actuary, Tom Wortman, and Regulatory Affairs VP Mike Becker made three trips to the Insurance Division to make the company's case that the rate increase was necessary. The last trip, the two brought the CEO, and they met with Scott Kipper and Cory Streisinger.

(Ex. P45.)

17. That same date, April 11, 2008, the Department notified Regence through the SERFF system that it had approved the Individual 2008 Third Quarter Rate Filing with the 10.3 percent quarterly rate increase. (Exs. A16 and P43.) In an accompanying letter addressed to Regence President Bart McMullan, Insurance Administrator Kipper wrote:

The Oregon Insurance Division has approved the above referenced rate request filed by Regence BlueCross BlueShield of Oregon (the Company) after careful review and questioning of your actuarial justification. This review convinced us that this product's performance requires the Insurance Division to monitor certain indicators to demonstrate the appropriateness of this rating action.

Therefore the Company is directed to provide monthly to the Oregon Insurance Division the following information for its Individual Medical product line, beginning with October 2007 and going forward monthly, on both a paid and an incurred basis.

- Claims
- Gross Premiums
- Commissions
- OMIP Assessment
- Operating expenses that are directly allocable to this block of business
- General company operating expenses that have been allocated to this block of business
- Sales – number of new lives
- Sales – number of new premiums
- Terminations – number of lives
- Terminations – amount of premiums

The monthly reporting will continue through March 31, 2009, or until such time that the Division considers the reporting no longer necessary.

(Ex. A16 at 3; Ex. P44.)

18. In an April 11, 2008 file memorandum, Fitzpatrick wrote:

The Oregon Insurance Division has reluctantly approved this rate filing after the Company has demonstrated the large 26% rate increase is actuarially justified and convincing the Division that consumers will have options to maintain coverage with a smaller rate increase by shifting to a less rich plan. Additionally, the Division and Company have agreed to conditions whereby the Division will be kept aware monthly of the medical loss ratio, company expenses and other indicators for the Division to monitor the performance of this product line and to demonstrate the appropriateness of this considerable rating action.

* * *

This agreement is not a penalty for implementing the large rate increase, but rather an understanding by both parties of the seriousness with which the Division views such a large rate increase in the Individual Medical marketplace.

(Ex. P41.)

19. The Department's April 11, 2008 decision to approve Regence's Individual 2008 Third Quarter Rate Filing was based on the following factors: (1) the losses Regence was currently experiencing on the individual health line; (2) the adverse financial projections; and (3) the moderate average rate increases that policyholders would experience over the period of July 1, 2005 through July 1, 2008. (Ex. I11.)

20. On April 16, 2008, Fitzpatrick emailed Kipper regarding the Department's approval of Regence's Individual 2008 Third Quarter Rate Filing. He wrote:

Scott,

David and I have discussed this briefly. The difference is the \$15 million loss on the individual line and my \$2.2 million loss was on the whole company.

We will prepare a response to address the concerns.

Scott F.

(Ex. I14.)

21. On or about June 30, 2008, Petitioner Karen Kirsch submitted a petition to the Department challenging its approval of Regence's Individual 2008 Third Quarter Rate Filing.

Kirsch asserted that the rate increase was excessive, inequitable, prejudicial to the interests of policyholders and unreasonable in relation to benefits provided. (Ex. P50.)

22. In the opinion of healthcare economist Larry Kirsch, a determination as to whether an insurer's premium rate is prejudicial to the interests of the insurer's policyholders involves an inquiry into the policy's affordability. In Larry Kirsch's opinion, a proposed rate must be evaluated in terms of the policyholders' income. Some states (but not Oregon) have enacted laws to define affordability for individual insurance lines. In Massachusetts, for example, under the Universal Healthcare Plan, the defined relation of premium to income is 6.6 percent, meaning that only 6.6 percent of a person's income should be devoted to health insurance. (Test. of L. Kirsch.)

23. In the opinion of James Swenson, an actuary and technical consultant to the Department, the Department is not statutorily required to consider affordability in terms of policyholders' income. In Swenson's experience, although there are states that have enacted laws that define health insurance affordability as a percentage of income, those states have also had to subsidize premiums to meet the standard, because health care costs are currently at 16 to 17 percent of gross national product. The State of Oregon has not established specific affordability standards for individual health insurance and does not have any mechanism in place to subsidize premiums. In Swenson's opinion, the Department's obligation in reviewing and approving a rate filing is to ensure a good value to policyholders and maintain Oregon's competitive insurance market. When there are several capable competitors in the market, and each company has a respectable market share, the competitive pressure helps keep coverage affordable. (Test. of Swenson.)

CONCLUSIONS OF LAW

1. The Department was not required to make written findings of fact and conclusions of law in connection with its approval of Regence's Individual 2008 Third Quarter Rate Filing.
2. The Department applied the correct legal standards and conducted a proper review when it approved Regence's Individual 2008 Third Quarter Rate Filing.
3. Because the Department conducted a lawful review, its approval of Regence's Individual 2008 Third Quarter Rate Filing is upheld.

OPINION

Prior to hearing, the Department and Petitioner agreed that Regence's Individual 2008 Third Quarter Rate Filing was subject to Department review under the provisions of ORS 742.003, 742.005 and 743.767. Although ORS 742.003 and 742.005 specifically refer to policy forms and not premium rates, the Department stipulated that the standards and criteria set out in ORS 742.005 ("Grounds for disapproval of policy forms") are applicable to this proceeding.

ORS 742.003(1) prohibits insurers from issuing policies until the policy form has been filed with and approved by the Department. ORS 742.003(2) requires the Department to approve

or disapprove the policy form within 30 days, unless the Department grants another 30 day extension by giving written notice to the insurer.

ORS 742.005, as noted above, sets out the grounds for Department disapproval of policy forms. It provides, in pertinent part, as follows:

The Director of the Department of Consumer and Business Services shall disapprove any form requiring the director's approval:

- (1) If the director finds it does not comply with the law;
- (2) If the director finds it contains any provision, including statement of premium, or has any label, description of its contents, title, heading, backing or other indication of its provisions, which is unintelligible, uncertain, ambiguous or abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued;
- (3) If, in the director's judgment, its use would be prejudicial to the interests of the insurer's policyholders;
- (4) If the director finds it contains provisions which are unjust, unfair or inequitable;
- (5) If the director finds sales presentation material disapproved by the director pursuant to ORS 742.009 is being used with respect to the form; or
- (6) If, with respect to any of the following forms, the director finds the benefits provided therein are not reasonable in relation to the premium charged:
 - (a) Individual health insurance policy forms, including benefit certificates issued by fraternal benefit societies and individual policies issued by health care service contractors, but excluding policies referred to in ORS 743.402 as exempt from the application of ORS 743.405 to 743.498, 743A.160 and 743A.164; * * *.

The Department explained its obligation to review rate filings under ORS 742.005 in its May 2008 *Health Insurance in Oregon* publication as follows:

Rate filings must include actuarial documentation supporting the rates and are reviewed under statutory provisions that provide that rate filings will be disapproved if the filings are deemed "prejudicial to the interests of the insurer's policyholders," if the filings contain "provisions which are unjust, unfair or inequitable," or most significantly, if the "benefits . . . are not reasonable in relation to the premium charged." ORS 742.005.

In this contested case proceeding, Petitioner Kirsch challenges the Department's April 11, 2008 approval of Regence's Individual 2008 Third Quarter Rate Filing. Specifically, Petitioner asserts that the Department failed to make appropriate findings, and that the Department's determination was not supported by substantial evidence. Petitioner also contends that the Department did not properly apply the criteria set out in ORS 742.005 in evaluating the rate filing, and never presented a rational basis for the approval.

The Department, on the other hand, contends that its approval of Regence's rate filing met the applicable legal standards, and that its interpretation of the provisions of ORS 742.005 is entitled to deference. Regence similarly asserts that the Department's review process complied with the applicable statute and rules. Both the Department and Regence assert that, despite Kirsch's contentions, the Department was not required to issue a formal order or make specific findings of fact or conclusions of law in approving the rate filing.

1. The Burden of Proof and Standard of Review

The Department asserts that, as the proponent of the position that the Department did not meet the applicable legal requirements for approving Regence's rate increase, Petitioner bears the burden of proof. Petitioner, on the other hand, seeks to shift the burden to the Department to justify the approval. Petitioner asserts that because the Department did not issue written findings of fact and conclusions of law in connection with its approval of Regence's rate filing, the lack of a written record should be construed against the agency. Petitioner argues that the lack of reference to legal standards in the Department's records for this filing indicates that the Department did not consider the provisions of ORS 742.005 when it approved the rate increase.

Pursuant to ORS 183.450(2), Petitioner bears the burden of proof in this case regardless of the nature of the written record documenting the basis for the Department's approval of Regence's Individual 2008 Third Quarter Rate Filing. Further, because the Department's April 11, 2008 approval of the rate filing constitutes an "order in other than a contested case,"³ the Department had no obligation to make a record or make findings of fact before issuing the approval. *Norden v. Water Resources Dept.*, 391 Or 641, 647 (2000); *see also Kucera v. Bradbury*, 337 Or 384 (2004) (explaining that, under *Norden*, an agency's failure to incorporate findings of fact or conclusions of law into an order in other than a contested case to explain the basis for the order is not a violation of any law).

Consequently, I reject Petitioner's contention that the absence of findings of fact or conclusions of law issued in conjunction with the Department's April 11, 2008 approval of Regence's rate filing is, by itself, persuasive evidence that the Department failed to apply and consider the provisions of ORS 742.005 in issuing the approval. Petitioner bears the burden to prove that the Department abused its discretion, *i.e.*, that it acted outside its statutory authority or violated a statutory or constitutional provision in approving Regence's Individual 2008 Third Quarter Rate Filing.

2. The Statutory Standards

As set out above, ORS 742.005 is written in the negative. The statute requires the Department to disapprove a rate filing if, in the director's judgment, the rate filing is "prejudicial

³ In Oregon administrative law, there are two types of agency orders – orders in a contested case and orders in other than a contested case. A "contested case" is defined in ORS 183.310(2)(a)(A) – (D). An order in other than a contested case is defined by "negative criterion." *See Oregon Env. Council v. Oregon State Bd. of Ed.*, 307 Or 30 (1988). Where none of the four categories described in ORS 183.310(2)(a) apply, the agency's determination constitutes an order in other than a contested case. *Oregon Business Planning Council v. LCDC*, 290 Or 741 (1981).

to the interests of the insurer's policyholders," if the director finds the filing contains "provisions which are unjust, unfair or inequitable," or if the director finds that the "benefits provided therein are not reasonable in relation to the premium charged."

ORS 742.005 specifically requires that the Department Director use his or her judgment. The statute also contains the terms "prejudicial," "unjust, unfair and inequitable" and "not reasonable." These are clearly "delegative" terms. The legislature uses delegative terms in a statute when it wishes to give an agency "the authority, responsibility and discretion for refining and executing generally expressed legislative policy." *Springfield Education Association v. School District*, 290 Or 217 (1980). As the *Springfield* court explained:

The delegation of responsibility for policy refinement under such a statute is to the agency, not to the court. The discretionary function of the agency is to make the choice and the review function of the court is to see that the agency's decision is within the range of discretion allowed by the more general policy of the statute.

Id. at 229. See also *Citizen's Utility Board v. PUC*, 154 Or App 702 (1998) (delegative terms are entitled to the highest level of deference in reviewing the agency's interpretation).

Recognizing that the legislature gave the Department broad discretion in terms reviewing and approving rate filings, my review in this case is limited to determining whether, in approving Regence's Individual 2008 Third Quarter Rate Filing, the Department considered the criteria it was statutorily required to consider. Stated differently, my task in resolving Petitioner's challenge to the Department's decision is not to substitute my judgment for that of the Department Director, but rather to determine whether the Department exceeded the range of discretion delegated to it by law.

A. ORS 742.005(3): Prejudicial to the interests of the insurer's policyholders.

Petitioner contends that the Department did not offer a coherent interpretation of the term "prejudicial" and did not apply the requirement of ORS 742.005(3) in a consistent and objective manner when it approved Regence's rate filing. Petitioner also asserts that the term "prejudicial" encompasses the concept of affordability. Petitioner contends that the Department abused its discretion by not evaluating the proposed rate increase in proportion to economic factors, such as members' personal income.

At hearing, Department actuary Fitzpatrick testified that, as used in ORS 742.005(3), the term "prejudicial" involves an evaluation of a proposed rate increase in light of the medical trend. He explained that, in his opinion, a quarterly increase of more than 15 percent on an individual policy would be prejudicial to the consumer, because the medical trend is in the low teens. Fitzpatrick also asserted that "prejudicial" means that the proposed rate increase is so high that the consumer cannot keep his or her coverage intact. Department consultant Swenson testified that as part of its review of a rate filing, the Department considers whether the rate provides a good value for the policyholder.

As evidenced by the Department's witnesses' testimony, as well as Fitzpatrick's "Gaming the System" spreadsheets, the Department specifically considered the impact that the 10.3 percent quarterly increase would have on policyholders. As part of the approval process, the Department's actuaries and decision makers reviewed Regence's historical and forecasted claims costs and premiums, the incurred and forecasted losses, the rate history of the individual health insurance line for the previous three years, enrollment projections and other carriers' rates. Although Fitzpatrick expressed concern about consumer backlash and hoped to persuade Regence to accept a smaller increase, he did not believe that Regence's Individual 2008 Third Quarter Rate Filing was unduly prejudicial to policyholders.⁴ Indeed, the fact that the Department twice rejected the proposed increase and required Regence to actuarially justify the rate change before it granted approval shows that the Department carefully considered the policyholders' interests.

The fact that the Department did not specifically address affordability as defined by Petitioner, *i.e.*, the premium cost as a percentage of policyholders' income, does not mean that the Department abused its discretion in approving the rate filing. Nothing in the statute requires the Department to use this measure as a consideration.

B. ORS 742.005(4): Provisions which are unjust, unfair or inequitable.

Citing to Fitzpatrick's testimony at hearing,⁵ Petitioner asserts that the Department failed to consider whether Regence's rate filing contained provisions that were "unjust, unfair or inequitable." The Department asserts that Fitzpatrick was neither the sole reviewer nor the ultimate decision maker on the Regence rate filing, and that the standards set out in ORS 742.005(4) were considered in approving the rate increase. The Department notes that decision making authority rested with Department Director Streisinger and/or Insurance Administrator Kipper, and the evidence demonstrates that the decision makers satisfied this requirement.

Although Fitzpatrick believed that the requirements of subsection (4) did not specifically apply to premium rates, the record establishes that he and other Department reviewers considered whether the proposed rate increase was unfair or inequitable. As discussed above, Fitzpatrick considered the impact of the rate increase on Regence policyholders. On his first review of the filing, which resulted in the Department's offer to approve a 2 percent quarterly increase,

⁴Although Fitzpatrick believed Regence's rate filing satisfied the applicable standards set out in ORS 742.005, Fitzpatrick hoped that he could convince the company to go with a smaller rate increase:

Q (Anderson): So it's your, was it your intention that you wanted to really make sure that they'd done everything they could to help people?

A (Fitzpatrick): I was looking for, I was looking for any procedure, policy, I will use the word "trick," anything I could find to possibly get a lower rate increase for Oregon consumers.

Q (Anderson): Even though they [inaudible] the legal standards

A (Fitzpatrick): Yes.

⁵ Fitzpatrick testified that he personally did not apply ORS 742.005(4) because that subsection refers to "provisions," and he was analyzing a rate increase and not reviewing a change in policy provisions. In Fitzpatrick's opinion, subsection (4) applies to benefits and not to rates.

Fitzpatrick's intention was to keep the quarterly rate increase to less than five percent or less than 20 percent on an annual basis. While the filing was pending before the Department, Fitzpatrick created spreadsheets that modeled different options available to policyholders to reduce the impact of the proposed increase. He calculated how a member in the Premier or Plus plans could minimize the increase by stepping down to the Basic plan. In addition, during their meetings with Regence, the Department's representatives questioned the impact of the increase on Regence's members. The Department also required Regence to explain and justify, through projections and financial information, the need for such a substantial rate increase.

The record sufficiently demonstrates that, before approving Regence's Individual 2008 Third Quarter Rate Filing, the Department considered whether the filing contained provisions which were unjust, unfair or inequitable. The Department therefore complied with the requirements of ORS 742.005(4).

C. ORS 742.005(6): Benefits provided reasonable in relation to premium charged.

This statutory subsection focuses on the relationship between claims paid and premiums earned. Petitioner asserts that the Department's decision making process was "chaotic and incoherent" and that it did not sufficiently analyze whether the benefits provided were reasonable in relation to the premium charged. Petitioner also asserts that because there is no clear evidence as to Kipper's and/or Streisinger's thought process in approving the rate increase, the absence of such evidence must be construed against the Department.

Fitzpatrick testified that, in reviewing Regence's Individual 2008 Third Quarter Rate Filing, he considered the relationship between the proposed premium rates and the benefits provided. He was confident that the filing met this requirement. In Fitzpatrick's opinion, ORS 742.005(6) incorporates the NAIC guidelines for minimum incurred target loss ratio. Because Regence's projected target loss ratio exceeded the NAIC's minimum acceptable level of 55 percent, the benefits provided met the statutory standard and were reasonable in relation to premium charged.

Fitzpatrick also considered actuarial data provided by Regence indicating that the company had been incurring a significant loss on its individual health insurance line. He recognized that the company needed to adjust its target loss ratio to sustain the line of business. Although Fitzpatrick remained concerned about the impact the 10.3 percent rate increase would have on policyholders, he, Ball and the Department's decision-makers were nevertheless satisfied that Regence's projected target loss ratio was appropriate and the benefits provided were reasonable in relation to the premium charged. The record therefore demonstrates that the Department considered the requirements of ORS 742.005(6) in approving Regence's Individual 2008 Third Quarter Rate Filing.

In summary, the record establishes that the Department applied and considered the statutory standards when it reviewed Regence's Individual 2008 Third Quarter Rate Filing. The Department considered the rate increase in light of medical trend and impact on the policyholders. The Department modeled different options available to policyholders to minimize the impact of the rate increase. After agreeing to approve smaller increases, the Department

eventually determined that although the 10.3 percent rate increase was significant, it was necessary to keep the product line financially sound. The Department also determined that the benefits provided were reasonable in relation to premium charged and that the rate continued to provide a good value to the policyholder. In approving the rate filing, the Department relied upon the losses Regence was experiencing on this insurance line, the adverse financial projections and the average rate increase percentage over the previous three years. Although Petitioner and others may not agree with the Department's reasoning and determination, the record fails to establish that the Department abused its discretion or acted outside its statutory authority in approving the rate filing.

3. *Remedy*

Because the Department acted within its authority when it approved Regence's Individual 2008 Third Quarter Rate Filing, the approval must stand. Petitioner's request to rescind the rate filing approval is denied.

ORDER

The Department's April 11, 2008 approval of Regence's Individual 2008 Third Quarter Rate Filing, SERFF Tracking No. RGAC-125513025, is AFFIRMED.



Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: June 23, 2009

Notice of Right to File Exceptions to Proposed Order

If the proposed order is adverse to a party, then the party has the right to file written exceptions to the order and present written argument concerning those exceptions pursuant to ORS 183.460. A party may file the exceptions and argument by sending them to the Insurance Division by delivering them to the Labor and Industries Building, 350 Winter Street NE, Room 440 (4th Floor), Salem, Oregon; or mailing them to P.O. Box 14480, Salem, Oregon 97309-0405; or faxing them to 503-378-4351; or e-mailing them to mitchel.d.curzon@state.or.us. The Insurance Division must receive the exceptions and argument within 30 days from the date this order was sent to the party.

CERTIFICATE OF SERVICE

On the 23rd day of June 2009, I mailed the foregoing Proposed Order in Reference No. 0807007.

BY FIRST CLASS MAIL:

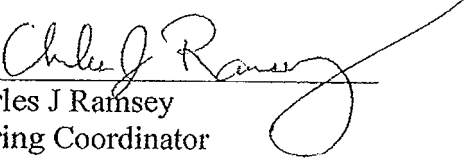
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