

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
1511 PONTIAC AVENUE, BLDG. 69-2
CRANSTON, RHODE ISLAND 02920**

East Bay Auto, Inc.; Euro Motor Cars, Inc.; Casale’s Autobody, Inc.;
Hillview Auto Body, Inc.; Bigelow Auto Body, Inc.; Randy’s Auto, Ltd.;
C.L. Enterprises, Inc.; Safe-Way Auto Sales, Inc.; Mike’s Auto Body, Inc.;
West Warwick Auto City, Inc.; D&H Auto Group;
Curreri Collision Center, Inc.; New Century Auto Body, Inc.;
Cranston Collision Center Sale & Service, Inc.; Michaud Auto Body, Inc.;
Choice Collision Center, Inc.; Auto Service Auto Body, Inc.; Todisco
Enterprises, Inc.; Providence Auto Body, Inc.; Pacheco Automotive, Inc.;
Rego’s Auto Body, Inc.; Anthony’s Auto Body, Inc.; Detroit Collision
Center, Inc.; Rick’s Auto Body, Inc.; Blackstone Auto Sales & Body, Inc.;
Auto Body Concepts, Inc.; and Warwick Auto Body, Inc.,
Complainants

v.

Allstate Insurance Group; Berkshire Hathaway Insurance Group (Geico);
Mapfre Insurance Group; Metropolitan Group; Amtrust Gmaci Maiden
Group; Hartford Fire & Casualty Group; Main Street America Group;
Berkshire Hathaway Insurance Group (National Indemnity);
Nationwide Corporation Group; Progressive Group; Selective Insurance
Group; United States Automobile Assn. Group; Ohio Mutual Group;
Providence Mut. Fire Ins. Co; Travelers Group; Amica Mutual Group;
and Liberty Mutual Group,
Respondents.

DBR Case Nos.: 2017-IN-001 through 2017-IN-017 Administratively Consolidated

DECISION

I. INTRODUCTION

This matter arose pursuant to Orders Appointing Hearing Officer and Providing Notice of Complaint Hearing (“Orders”) issued by the Department of Business Regulation (“Department”) to the above-captioned insurance companies (“Respondents”) licensed as property-casualty insurers in the State of Rhode Island in response to complaints filed by the above-captioned

complainants (“Complainants”). A status conference was held on May 5, 2017. The Respondents filed motions to dismiss to which the Complainants objected. After hearing on the motions on June 20, 2017, an order denying the motions to dismiss was entered on July 28, 2017.¹ A status conference was held on January 19, 2018 at which time the Complainants and Respondents agreed to file stipulated facts and issues to be determined by the hearing officer and set a briefing schedule. The stipulation and all briefs were timely filed by May 18, 2018. On June 29, 2018, the undersigned forwarded a recommended decision to the Department’s Director which was modified by the Director on August 1, 2018 and remanded back to the undersigned to make further findings of facts and conclusions of law. A status conference with the parties addressing the issues raised in the remand was held on September 17, 2018. At the status conference, it was agreed by the parties that no further evidence needed to be presented. The parties were given an opportunity to present proposed findings of facts and the parties all timely filed proposed findings of facts and conclusions of law by November 1, 2018. Some parties timely filed replies to proposed findings by November 9, 2018. The decision dated August 1, 2018 is hereby incorporated by reference.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*, R.I. Gen. Laws § 27-29-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and Department regulation 230-RICR-100-00-2 *Rules of Procedure for Administrative Hearings* (“Hearing Regulation”).

III. STIPULATED ISSUES AND FURTHER FINDINGS OF FACTS

The issues in this matter arise from the labor rate survey required to be conducted by the Respondents pursuant to R.I. Gen. Laws § 27-29-4.4 and its attendant regulation, *Insurance*

¹ The Respondents filed an interlocutory appeal of the July 28, 2017 order with the Superior Court which was denied on January 10, 2018. See *Allstate Ins. Co. et al. v. Department of Business Regulation*, 2018 R.I. Super. LEXIS 3.

Regulation, 230-RICR-20-05-10 Auto Body Labor Rate Survey ("Survey Regulation").² The Complainants are all licensed as automobile body shops pursuant to R.I. Gen. Laws § 5-38-1 *et seq.*

In the initial stipulation, the Complainants and the Respondents agreed that the Complainants alleged violations by the Respondents of R.I. Gen. Laws § 27-29-4.4 and/or the Survey Regulation in their 2016 labor rate survey filings and provided that the hearing officer should consider the following issues in the determination of these matters:

1. Whether Respondent Allstate Insurance Company, misnamed as Allstate Insurance Group ("Allstate"), used information obtained from Connecticut and misrepresented what ICAR gold means and represents in the insurance industry when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

2. Whether American Commerce Insurance Company, misnamed as MAPFRE Insurance Group ("American Commerce") used CCC and Mitchell estimating data that reflects the average industry labor rate and did not consider labor rates specific to Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

3. Whether AMICA Mutual Insurance Company, misnamed as AMICA Mutual Group ("AMICA") based its labor rates on a cross section of information including repair facilities, direct repair shops ("DRP") and non-DRP, dealerships, and independent shop operators, independent appraisal vendors and insurance staff appraiser data, and did not take into account labor rates specific to Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

4. Whether Amtrust GMACI Maiden Group ("Amtrust") did not take into account labor rates specific to Class A designated auto body shops when it included all shops in one analysis and determined labor rates for Class A auto body shops and Class B auto body shops that are only \$2.00 apart when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

5. Whether GEICO Indemnity Company, Government Employees Insurance Company, GEICO General Insurance Company and GEICO Casualty Company (referred to by Complainants as Berkshire Hathaway Insurance Group) ("GEICO") did not take into account questionnaire responses received from Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

6. Whether The Hartford Financial Services Group, misnamed as The Hartford Fire & Casualty Group ("Hartford"), did not take into account labor rates specific to Class A designated auto body

² This regulation was previously *Insurance Regulation 108 Auto Body Labor Rate Survey* and was amended on March 17, 2016 to take into account statutory amendments (discussed below) to R.I. Gen. Laws § 27-29-4.4. It was renamed and refiled effective March 17, 2017 pursuant to codification of regulations required by R.I. Gen. Laws § 42-35-5.

shops when it submitted its Labor Rate Filing to Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

7. Whether Liberty Mutual Group ("Liberty Mutual") used information obtained from Connecticut and did not take into account labor rates specific to Class A designated auto body shops when it submitted its Labor Rate Filing to Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

8. Whether Main Street America Group ("Main Street") compiled separate and distinct labor rate survey results of the Class A designated shops when it submitted its Labor Rate Filing to the Department, and, if not, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

9. Whether Metropolitan Insurance Group ("Metropolitan") rejected 43 out of 45 surveys received from auto body shops and did not compile separate and distinct labor rate survey results of the Class A designated shops when it submitted its Labor Rate Filing to Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

10. Whether National Indemnity Company ("NICO") did not take into account questionnaire responses received from Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

11. Whether Nationwide Corporation Group ("Nationwide") violated R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation when it took into consideration its DRP rates when calculating or determining its Labor Rate Filing to the Department.

12. Whether Ohio Mutual Group ("Ohio Mutual") blended the rates of Class A designated auto body shops and Class B designated auto body shops instead of using the separate data from the labor rate surveys and used averages of estimates that it has previously paid when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

13. Whether Members of the Progressive Group of Companies doing business in Rhode Island, misnamed as Progressive Group ("Progressive") did not compile separate and distinct labor rate survey results of the Class A designated shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

14. Whether Providence Mutual Fire Insurance Company ("Providence Mutual") improperly rejected the surveys received from auto body shops when it established a labor rate for Class A designated auto body shops and improperly determined that it will pay an aluminum labor rate to the Class B designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

15. Whether Selective Insurance Group ("Selective") used an arbitrary labor rate when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

16. Whether the Travelers Companies, Inc., misnamed as Travelers Group ("Travelers"), ignored in its entirety Class A survey results when it established a labor rate for Class A designated

auto body shops, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

17. Whether United Services Automobile Association ("USAA") used subrogation rates as part of its formula in determining the prevailing labor rate, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

18. In order for the Hearing Officer to determine the aforementioned issues in paragraphs 4, 5, 6, 7, 8, 9, 10, 12, and 13 concerning compilation or blending of responses received from the Class A and Class B designated auto body repair shops in response to the surveys, the Hearing Officer must determine whether R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation prohibits an insurance company from aggregating the responses received from Class A and Class B designated auto body repair shops when it submits a Labor Rate Filing to the Department.

19. In order for the Hearing Officer to determine the aforementioned issues in paragraphs 9, 14, and 16 concerning an insurance company's rejection of survey responses received from auto body repair shops, the Hearing Officer must determine whether each Labor Rate Filing explained why the insurance company rejected consideration of the labor rate surveys submitted by the auto body repair shops in accordance with R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

20. In order for the Hearing Officer to determine the aforementioned issues in paragraphs 1, 2, 3, 7, 11, and 17 concerning data used in establishing a prevailing rate, the Hearing Officer must determine whether the consideration of factors besides auto body labor rate survey results, including but not limited to, contract rates, subrogation rates, and rates obtained in a geographical area outside of Rhode Island are prohibited under R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

Further Findings of Facts:

It is undisputed by the parties that the Respondents timely submitted labor rate surveys to the Department for 2016 which were accepted by the Department and posted on the Department website.³ Copies of said surveys have been filed with the undersigned at various points during these proceedings.

Based on the initial stipulation, the proposed findings of facts, and labor rate surveys, additional findings of facts are as follows:

1. On August 30, 2016, Allstate submitted its labor rate survey to the Department. See Remand Decision Exhibit One (1).

2. On September 1, 2016, American Commerce submitted its labor rate survey to the Department. See Remand Decision Exhibit Two (2).

³ http://www.dbr.ri.gov/documents/news/insurance/Amended_Bulletin_2016-4_Auto_Body_Labor_Rate_Survey_Results.pdf.

3. On August 31, 2016, AMICA submitted its labor rate survey to the Department. See Remand Decision Exhibit Three (3).

4. On August 31, 2016, Amtrust submitted its labor rate survey to the Department. See Remand Decision Exhibit Four (4).

5. On August 29, 2016, GEICO submitted its labor rate survey to the Department. See Remand Decision Exhibit Five (5).

6. On August 26, 2016, Hartford submitted its labor rate survey to the Department. See Remand Decision Exhibit Six (6).

7. Liberty Mutual timely submitted its labor rate survey to the Department. See Remand Decision Exhibit Seven (7).

8. On August 25, 2016, Metropolitan submitted its labor rate survey to the Department. See Remand Decision Exhibit Eight (8).

9. On September 1, 2016, Main Street submitted its labor rate survey to the Department. See Remand Decision Exhibit Nine (9).

10. On September 1, 2016, NICO submitted its labor rate survey to the Department. See Remand Decision Exhibit Ten (10).

11. Nationwide timely submitted its labor rate survey to the Department. See Remand Decision Exhibit 11.

12. On August 26, 2016, Ohio Mutual submitted its labor rate survey to the Department. See Remand Decision Exhibit 12.

13. On August 18, 2016, Progressive submitted its labor rate survey to the Department. See Remand Decision Exhibit 13.⁴

14. Providence Mutual timely submitted its labor rate survey to the Department. See Remand Decision Exhibit 14.

15. Selective timely submitted its labor rate survey to the Department. See Remand Decision Exhibit 15.

16. On August 26, 2016, Travelers submitted its labor rate survey to the Department. See Remand Decision Exhibit 16.

⁴ Included in copies of the labor survey filings by the Respondents provided by the Department to the undersigned was a labor rate survey report from Progressive dated August 28, 2018 that had the same cover letter as the August 18, 2018 report, but contained more attachments.

17. USAA timely submitted its labor rate survey to the Department. See Remand Decision Exhibit 17.

18. In determining its labor rates, Allstate used information from Connecticut.

19. In determination its labor rate survey, American Commerce relied on information from CCC and Mitchell estimating data.

20. In its labor rate survey, AMICA wrote as follows:

We validated this dollar amount reviewing a cross section of data provided by the three major collision industry information providers; CCC Information Services, Mitchell International and Audatex, a Solera Company. This cross section includes repair facilities, DRP and non DRP, dealerships, and independent shop operators, independent appraisal vendors and insurance staff appraisers. We also monitor and analyze information captured internally and communicate with our field associates regarding local market conditions.

21. A review of Liberty Mutual's survey report shows that it did not use Connecticut information in determining rates.

22. Nationwide took into consideration DRP rates as part of its formula or manner in determination its 2016 prevailing labor rate.⁵

The parties agreed to three (3) issues. These are set forth below followed by the relevant Respondent for each issue:

FIRST ISSUE:

In order for the Hearing Officer to determine the aforementioned issues in paragraphs 4, 5, 6, 7, 8, 9, 10, 12, and 13 concerning compilation or blending of responses received from the Class A and Class B designated auto body repair shops in response to the surveys, the Hearing Officer must determine whether R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation prohibits an insurance company from aggregating the responses received from Class A and Class B designated auto body repair shops when it submits a Labor Rate Filing to the Department.

The Respondents who fall under this issue are as follows: Amtrust, GEICO, Hartford, Liberty Mutual, Main Street, Metropolitan, NICO, Ohio Mutual, and Progressive.

⁵ In terms of the initial stipulation, the issues regarding many individual insurance companies' surveys was whether the actual survey submitted to the Department conformed with the statute. That determination relies on a review of each survey itself so that each survey does not need a separate finding of fact describing what is contained in each survey since each actual survey is part of the record and will be discussed below.

SECOND ISSUE:

In order for the Hearing Officer to determine the aforementioned issues in paragraphs 9, 14, and 16 concerning an insurance company's rejection of survey responses received from auto body repair shops, the Hearing Officer must determine whether each Labor Rate Filing explained why the insurance company rejected consideration of the labor rate surveys submitted by the auto body repair shops in accordance with R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

The Respondents who fall under this issue are as follows: Metropolitan, Providence Mutual, and Travelers.

THIRD ISSUE:

In order for the Hearing Officer to determine the aforementioned issues in paragraphs 1, 2, 3, 7, 11, and 17 concerning data used in establishing a prevailing rate, the Hearing Officer must determine whether the consideration of factors besides auto body labor rate survey results, including but not limited to, contract rates, subrogation rates, and rates obtained in a geographical area outside of Rhode Island are prohibited under R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

The Respondents who fall under this issue are as follows: Allstate, American Commerce, AMICA, Liberty Mutual, Nationwide, USAA, and Selective.⁶

IV. RELEVANT STATUTE AND REGULATION

R.I. Gen. Laws § 27-29-4.4 provides as follows:

Auto body repair labor rate surveys.

(a) Every insurance carrier authorized to sell motor vehicle liability insurance in the state shall conduct an auto body repair labor rate survey, subject to, and in accordance with, the following provisions:

(1) When used in this section the following definitions shall apply:

(i) "Auto body labor rate survey" is an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area.

(ii) "Prevailing auto body labor rate" means the rate determined and set by an insurer as a result of conducting an auto body labor rate survey in a particular

⁶ Selective was not included within an issue in the initial stipulation. However, based on the initial stipulation (at paragraph 15) and its proposed finding of facts, Selective falls under the third issue. While Selective was not included in the agreed to issues, this decision will address the three (3) issues as they relate to the other Respondents as detailed in the initial stipulation.

In the proposed finding of facts filed with the Department, some Respondents argued that if the Complainants failed to argue in their filings about certain specific insurance companies' possible violations that were part of the stipulated issues, those possible violations were waived. However, this decision will address all possible insurance company violations as agreed to in the initial stipulation.

geographic area and used by insurers as a basis for determining the cost to settle automobile property damage claims.

(iii) "Independent auto body repair facility" means any auto body repair facility that does not have a formal agreement and/or written contract with an insurer to provide auto body repair services to insureds and/or claimants.

(iv) "Direct repair program" means any methods through which an insurer refers, suggests, or recommends a specific auto body repair facility, with whom the insurer has a formal agreement and/or contract to provide auto body repair services, to insureds and/or claimants.

(v) "Contract rate" means any labor rate to which an auto body repair facility and an insurer have agreed in a formal agreement and/or written contract.

(2) Each insurer must annually conduct a separate and distinct written auto body labor rate survey for each classification of auto body shops as established by the Department of business regulation pursuant to § 5-38-5, to determine a separate and distinct prevailing auto body labor rate for each classification of fully licensed auto body repair facilities.

(3) Insurers may not use an auto body labor rate survey; contract rates from auto body repair facilities with which it has a formal agreement or contract to provide auto body repair services to insureds and/or claimants; rates paid as a result of subrogation, rates obtained from auto body repair facilities in a different classification than that being surveyed, or rates from a repair shop facility holding a limited or special use license.

(4) Each auto body labor rate survey shall include the following:

(i) The name and address of each shop surveyed in the labor survey;

(ii) The total number of shops surveyed;

(iii) The prevailing rate established by the insurer for each classification of full collision licensed auto body repair facilities; and

(iv) A description of the formula or method used to calculate or determine the specific prevailing rate reported.

(5) Each insurer must report the results of their auto body labor rate survey to the Department of business regulation insurance division.

(6) The Department of business regulation must promulgate regulations related to auto body labor rate surveys by October 1, 2006, establishing the following:

(i) A questionnaire that must be used by all insurers in their labor rate survey;

(ii) Date of reporting; and

(iii) Number or percentage of shops to be surveyed.

(7) The Department of business regulation shall review all surveys submitted for compliance with this section and any rules and regulations promulgated by the Department.

(b) Nothing contained in § 27-29-4.4 shall require an insurer to establish the prevailing rate for each classification of full collision licensed auto body repair facilities based solely on the survey results.

To implement this statute, the Department promulgated the Survey Regulation which provides in part as follows:

10.4 Definitions

A. As used in this Regulation:

1. "Auto body labor rate survey" means an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area.

2. "Contract rate" means any labor rate to which an auto body repair facility and an insurer have agreed in a formal agreement and/or written contract.

4. "Full collision repair auto body facilities" means those facilities designated as such in Part 30-05-2 of this Title.

7. "Prevailing auto body labor rate" means the rate determined and set by an insurer as a result of conducting an auto body labor rate survey and used by insurers as a basis for determining the cost to settle automobile property damage claims.

10.6 Procedure and Deadlines

A. Prior to May 1 of each calendar year, the Department will publish on its website a list of those insurers that meet the applicability requirement.

B. Each insurer to which this Regulation applies shall, prior to June 1 of each calendar year, send a questionnaire substantially in the form included hereto as § 10.10 of this Part to Full Collision Repair Auto Body Facilities. Separate and distinct questionnaires shall be sent to each classification of auto body repair facilities as designated by the Commercial Licensing division of the Department.

C. Concurrent with the posting of a list of insurers required to conduct a survey, the Department's Commercial Licensing Division will provide a list of Full Collision Repair Auto Body Facilities with identification of Classification A and B shops which insurers must survey for that years' compliance. The list will be posted on the Department's website.

D. Insurers will omit those Full Collision Repair Auto Body Facilities with whom the insurer or Insurance Group, if reporting on a group basis, has a formal agreement and/or written contract to pay contract rates in order to provide auto body repair services.

E. Insurers will send the questionnaire to all of the Full Collision Repair Auto Body Facilities that remain after deletion of those facilities indicated in § 10.6(D) of this Part above.

10.7 Report of Labor Rate Survey to the Department

A. The report must be filed no later than September 1 of each calendar year.

B. The Report of the Labor Rate Survey must include the following:

1. A list, including the name and address, of all Full Collision Repair Auto Body Facilities to which the labor rate survey was sent.

2. A list of the Full Collision Repair Auto Body Facilities that failed to respond to the questionnaire within the time specified by the insurer.

3. A list of questionnaires that were not taken into consideration by the insurer in its analysis of the survey, including the reason that each such questionnaire was rejected for consideration.

4. Results of the questionnaires considered by the insurer.

5. The total number of shops surveyed for each classification of shops.

6. A description of the formula or manner in which the insurer has calculated or determined the prevailing labor rate which it pays to auto body repair facilities including certification of compliance with R.I. Gen. Laws § 27-29-4.4 and this Part.

7. The separate prevailing labor rate(s) established by the insurer for each classification of full collision licensed auto body repair facilities.

8. If the calculation or formula indicated in § 10.7(B)(6) of this Part above is not based on the results of the questionnaires identified in § 10.7(B)(4) of this Part above, a complete explanation as to why it is not so based.

10.8 Questionnaire

A. Each insurer to which this Regulation applies shall utilize a survey based on the questionnaire included hereto as § 10.10 of this Part. ***

B. Insurers shall specify a date upon which the questionnaire must be returned to the insurer. The date specified must grant at least thirty (30) days notice for response.

D. Insurers may reject any questionnaire that is not properly completed or does not provide the full information requested and are not required to provide notification to the Full Collision Auto Body Facility. Insurers shall keep detailed records for such rejection to allow audit by the Department. Insurers may be ordered by the Department to consider any questionnaire so “rejected” to be accepted if the Department finds that enough information has been provided to allow for consideration of the questionnaire. All questionnaires and all other information regarding the survey shall be maintained by the insurer for a minimum of five years.

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, “the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. **Arguments**

i. Complainants

The Complainants argued that the Class A and B prevailing rates cannot be identical. The Complainants argued that some insurers improperly rejected or did not consider survey responses. The Complainants argued that many of the insurers’ explanations of why they did not consider the survey responses boils down to the fact that the insurers do not like the results of the survey. The Complainants argued that R.I. Gen. Laws 27-29-4.4(a)(3) excludes direct repair prices and

subrogation rates as well as any information from outside of Rhode Island when determining the prevailing labor rate.

ii. Respondents

Allstate, American Commerce, AMICA, Hartford, Liberty Mutual, Metropolitan, Ohio Mutual, Progressive, Providence Mutual, Selective, Travelers, and USAA argued that the stipulation is binding on the parties. They argued that the statute does not mandate a separate numerical prevailing rate for each classification, and provides what cannot be included in the surveys, but does not limit what information the insurers may possess. They also argued that they complied with the statute since the Department accepted the surveys and that this matter had now become a request for an advisory opinion because the Complainants are not seeking penalties but prospective relief.

Amtrust argued that it conducted separate and distinct surveys and set separate and distinct rates for Class A and B shops. Main Street argued it filed separate and distinct labor rates and it was appropriate not to consider survey responses that did not coincide with the insurer's experience. Nationwide argued the parties are bound by the stipulation and that the statute bars the use of contract rates (direct repair rates) in conducting the surveys, but not in establishing the prevailing rate. GEICO and NICO argued that there are no statutory requirements on how the prevailing rate should be set and there is no requirement that the rates cannot be identical. They argued that there is no evaluation standard for the explanation required when the prevailing rate is not based on the survey results.

C. What the Statute and the Survey Regulation Require

Before addressing the issues, the requirements of the statute and Survey Regulation will be discussed in order to understand the statutory and regulatory requirements and to apply them to the issues.

i. Overview

R.I. Gen. Laws § 27-29-4.4 provides that insurance carriers conduct an auto body repair labor rate survey. The survey is defined as an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area. R.I. Gen. Laws § 27-29-4.4(a)(1)(i). The prevailing auto body labor rate is defined as the rate set by an insurer after conducting an auto body labor rate survey and is used by the insurers as a basis for determining the cost to settle automobile damage. R.I. Gen. Laws § 27-29-4.4(a)(1)(ii). R.I. Gen. Laws § 27-29-4.4(b) provides that when establishing the prevailing rate, an insurer is not required to base the prevailing rate solely on the results of the auto body labor rate survey.

R.I. Gen. Laws § 27-29-4.4(b) was added by statutory amendment effective January 1, 2016. *Infra*. It codified what the Rhode Island Supreme Court already found in *Auto Body Ass'n v. State Dep't of Bus. Regulation*, 996 A.2d 91 (R.I. 2010). The Court found that the statute was ambiguous and upheld Department's finding that General Assembly had intended the labor rate survey to serve as one (1) factor in determining the prevailing labor rate. Thus, the auto body labor rate survey serves as an information gathering exercise for the insurers. By law, the insurers are not bound to set the prevailing rate based solely on the auto body labor rate survey.

R.I. Gen. Laws § 27-29-4.4(a)(5) requires that each insurer report the results of its survey to the Department. R.I. Gen. Laws § 27-29-4.4(a)(4) requires what must be in the report. The report must include the name and address of each shop surveyed, total number of shops surveyed, prevailing rate established for each auto body license classification, and a description of the formula or method used to determine the prevailing rate. Section 10.7(B)(6) of the Survey Regulation reiterates the statutory requirement that an insurer describe the formula or manner in which the insurer calculated or determined that prevailing labor rate. Since by statute, the rate is not necessarily based on the

results of the surveys, § 10.7(B)(8) requires that a complete explanation be given if the calculation or formula indicated in § 10.7(B)(6) is not based on the results of the questionnaires. Section 10.7(B)(3) also requires that questionnaires that were not taken into consideration by an insurer in its analysis be listed in the report to the Department with the reason(s) that each was rejected for consideration.

In *Auto Body Ass'n*, the Court referenced that the Department in its declaratory ruling on the original statute found that the statute sought to provide additional transparency to the setting of rates. Certainly, the statute is setting out a process for conducting an auto body repair labor rate survey which is an analysis of information regarding rates of labor that the shops charge. However, the insurers set their own prevailing rate and the survey may or may not be the basis of that prevailing rate. The statute provides for an openness regarding the use of the survey in setting the prevailing rate, but the use of the surveys or their results are not mandated in the setting of the prevailing rate.

ii. What is not Included in the Survey

R.I. Gen. Laws § 27-29-4.4 mandates that insurance carriers in the State (further defined in the Survey Regulation) shall conduct an auto body repair labor rate survey. The statute lists items that are not be included in the survey. That list was expanded by statutory amendment effective January 1, 2016. See P.L. 2015, ch. 154 § 2 and P.L. 2015 ch. 142 § 2 (identical amendments). When amending the statutory list, the General Assembly changed most of the commas to semi colons, but the list still is for what items may not be included. As set forth above, R.I. Gen. Laws § 27-29-4.4(a)(3) provides as follows:

(3) Insurers may not use an auto body labor rate survey; contract rates from auto body repair facilities with which it has a formal agreement or contract to provide auto body repair services to insureds and/or claimants; rates paid as a result of subrogation, rates obtained from auto body repair facilities in a different classification than that being surveyed, or rates from a repair shop facility holding a limited or special use license.

Section (a)(3) is included in a statute entitled “auto body repair labor rate surveys.” Section (a)(3) makes no reference to determining the prevailing rate. Instead, it is part of list – (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7) – about a labor rate survey that must be conducted and how it is to be conducted and reported and what is to be included in labor rate survey report to the Department. It may have made for sense for the first phrase in (a)(3) to read as “insurers may not use [the following] in an auto body labor rate survey” followed by a colon and then include the items that follow next in the statute. Indeed, the Complainants in their brief inserted an “in” in that first phrase prior to the words, “an auto body.” However, the statute does not use the word “in.” Nonetheless, with or without the “in,” R.I. Gen. Laws § 27-29-4.4(a)(3) is about the auto body labor rate survey. There is no mention in the section of the prevailing rate or its calculation. Rather the section lists what is to be excluded from the auto body labor rate survey.

In conducting the survey, the statute says that insurers are not to use an auto body rate survey. The second phrase says insurers cannot use rates from a direct repair program since (a)(3) uses the terms from the direct repair program definition in R.I. Gen. Laws § 27-29-4.4(a)(1)(iv) (“any methods through which an insurer refers, suggests, or recommends a specific auto body repair facility, with whom the insurer has a formal agreement and/or contract to provide auto body repair services, to insureds and/or claimants.”). The third phrase in (a)(3) states that subrogation rates are to be excluded from the survey. Consistent with the statutory requirement of separate and distinct surveys for Class A and B licensed shops (discussed below), the fourth and fifth phrases state that the survey cannot include information from shops of a different licensed class than those being surveyed and that rates from limited or special use licensees cannot be included.

iii. **Separate and Distinct**

Effective January 1, 2016, the labor rate survey statute was amended to reflect a statutory change that provided for two (2) classifications for full auto body collision licenses. See P.L. 2015, ch. 154 § 2 and P.L. 2015 ch. 142 § 2 (identical amendments). R.I. Gen. Laws § 27-29-4.4(a)(2) now requires each insurer to annually conduct a separate and distinct written auto body rate survey for each classification of auto body shops established pursuant to R.I. Gen. Laws § 5-38-5. R.I. Gen. Laws § 5-38-5 establishes two (2) classifications for full collision licenses, Class A and Class B.⁷ Therefore, R.I. Gen. Laws § 27-29-4.4(a)(2) now requires insurers to conduct a written separate and distinct auto body rate survey for Class A and Class B auto body licensees **and** to determine a separate and distinct prevailing rate for each classification.⁸

As set forth above, the words of a statute are to be given their plain and ordinary meaning. The Supreme Court in *Auto Body Ass'n* found the statute to be ambiguous in terms of the issue of whether the survey was to be the sole determinant for setting the prevailing rate and in terms of the issue of which licensed insurers had to conduct such a survey.

Nonetheless, in *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), the Court relied on a dictionary definition in applying the “ordinary meaning” of “must.” *Id.*, at 674. As the Court has found, “[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized

⁷ *Commercial Licensing Regulation 230-RICR-30-05-2 Motor Vehicle Body and Salvage Vehicle Repair* implements the two (2) statutory classes of license for full collision facilities, Class A and Class B. Said regulation also provides for various limited auto body repair licenses, but by statute, the auto body repair labor rate surveys are of the full collision class of licenses.

⁸ Consistent with these statutory requirements, Section 10.6(B) of the Survey Regulation requires that insurers send annual questionnaires to “Full Collision Repair Auto Body Facilities” and that the questionnaires shall be “separate and distinct” to each classification of auto body repair facilities. Section 10.7(B)(7) of the Survey Regulation provides that in setting the rates, a “separate prevailing labor rate(s)” is to be “established by the insurer for each classification of full collision licensed auto body repair facilities.”

dictionary.” *Defenders of Animals, Inc.*, at 543. In terms of the narrow issue of the terms, “separate” and “distinct” as related to the conducting the survey, the common usage of the terms is appropriate to be used. “Separate” means “to set or keep apart” or “to make a distinction between.”⁹ Distinct means “distinguishable to the eye or mind as being discrete . . . or not the same: separate.”¹⁰

Thus, when conducting the survey, an insurer cannot survey Class A and Class B shops together. There is to be a separate and distinct survey for each class. Thus, the questionnaire provided by the Department to be used by insurers has each shop indicate whether it is an A or B class of shop. The insurer is then to set a separate prevailing rate for each classification. However, a separate rate does not mean that the rates cannot be the same. It could be in conducting both surveys, the insurer determines a rate that is the same for both shops or they could be different by one (1) dollar or five (5) dollars, *etc.* The statutory requirement is that the survey and the rate setting are separate and distinct.¹¹ Thus, the rates can be the same as long as the survey and determination were separate and distinct. While distinct can mean “not the same,” in this situation, not the same would be if an insurer set the rates for Class A and B shops together. The statute requires the process and the analysis be separate so that the rates are determined separately even if the rates end up the same.

The statute is setting a process by which auto body surveys are conducted. The statute does not mandate what can or cannot be considered by insurers in setting the prevailing rate. It just mandates that the insurers must explain why if the surveys were not a basis for setting the prevailing rate. It would not make sense for the statute to mandate that the Class A and Class B prevailing rates

⁹ <https://www.merriam-webster.com/dictionary/separate>.

¹⁰ <https://www.merriam-webster.com/dictionary/distinct>.

¹¹ The use of both terms really is redundant as both terms as used have the same meaning.

be different as the statute is only concerned with process. The determination process may come up with two (2) different rates or identical rates but as long as the process was separate and distinct in surveying and determining the two (2) rates, the rates can be identical.

iv. certain/particular geographic area

R.I. Gen. Laws § 27-29-4.4(a) applies the auto body repair labor rate survey requirements to motor vehicle liability insurance carriers in the state so within Rhode Island. The survey is of shops that are fully licensed by the Department so the survey is only of shops that are within Rhode Island. The definition in R.I. Gen. Laws § 27-29-4.4(a)(1)(i) for “[a]uto body labor rate survey” is “an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area.” As the survey is only to be of Rhode Island shops, it follows that the certain geographic area only refers to an area within Rhode Island.

R.I. Gen. Laws § 27-29-4.4(a)(1)(ii)’s definition of prevailing auto body labor rate refers to a rate set by an insurer as a result of conducting an auto body labor rate survey in a “particular geographic area.” The survey is only to be conducted within Rhode Island so “particular” like “certain” means within Rhode Island.

There is nothing in the statute about calculating the prevailing rate differently based on regional differences within Rhode Island. Certainly, most surveys have been conducted for all Rhode Island shops, but the statute does allow the labor rate survey to be of charges in a certain geographic area (e.g. by county). In fact, Travelers set a prevailing Class B rate by county. See Remand Decision Exhibit 15. However, how the prevailing rate is set is not limited by the statute. The statute does not limit considerations for setting the prevailing rate to only information from a particular geographic area. In other words, while the term certain/particular geographic area refers to within Rhode Island,

it is only used in connection with the labor rate survey. There is no such geographic limitation as to how the prevailing rate is determined.

v. **Setting the Prevailing Rate**

The insurers receive the returned surveys. Some responses may be rejected for being improperly completed or incomplete. The insurers are to keep records of those survey responses rejected as they are subject to Department audit. Section 10.8(D) of the Survey Regulation.

After receiving the results of the surveys, the insurers determine a prevailing rate for Class A and Class B shops. The statute does not have any requirements in how the prevailing rate is set. Instead, insurers are to report a “description of the formula or method used to calculate or determine the specific prevailing rate reported.” R.I. Gen. Laws 22-9-4.4(a)(4)(iv). The survey does not need to be the sole determinant of the prevailing rate. If the calculation of the prevailing rate is not based on the auto body survey results, a complete explanation is required in the insurer’s survey report.

“Complete” is defined as a “having all necessary parts, elements, or steps” or “total, absolute” or “fully carried out: thorough.”¹² While the Survey Regulation does not require the explanation be “justified,” complete would indicate that it must be more than the insurer does not like the results of the auto body survey. Thus, if the explanation given is that the insurer only received 40 of 100 shops surveyed so insurer felt that the data received did not cover enough shops so did not rely on the survey and instead relied on other data (that is explained/referenced in the description of calculating the prevailing rate), the Complainants may not like the explanation, but it would be “complete” in that it was a complete explanation of why the surveys were not considered.

Along with the complete explanation for not using the survey results as a basis for the prevailing rate, the insurers must keep a list of those questionnaires not taken into consideration in its

¹² <https://www.merriam-webster.com/dictionary/complete>.

analysis including the reason for not considering the response. It could be that the insurer considers all responses, but does not use them as a basis for the prevailing rate and gives a complete explanation. It could be that the insurer rejects some responses as incomplete and then also determines that some of the responses cannot be considered and gives reasons why. The insurer then could have remaining responses that it does not base the prevailing rate on but has considered. In other words, the insurer considers responses but then gives an explanation for not using the responses as a basis for the prevailing rate calculation.

D. Whether Respondents Violated R.I. Gen. Laws § 27-29-4.4 and/or the Survey Regulation

i. First Issue:

In order for the Hearing Officer to determine the aforementioned issues in paragraphs 4, 5, 6, 7, 8, 9, 10, 12, and 13 concerning compilation or blending of responses received from the Class A and Class B designated auto body repair shops in response to the surveys, the Hearing Officer must determine whether R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation prohibits an insurance company from aggregating the responses received from Class A and Class B designated auto body repair shops when it submits a Labor Rate Filing to the Department.

In 2016, the statute was amended to reflect the change in the licensing of full collision body shops. Because of the change in licensing, the statute now requires that the auto body surveys be conducted separately and distinctly so the insurers must provide separate Class A and B reports that include a description of the calculations for the separate and distinct prevailing rates for Class A and B. Section 10.7(B) of the Survey Regulation requires that a list of all shops to which the survey was sent and a list of those shops that failed to respond and a list of those surveys not taken into consideration and the total number of questionnaires considered by the insurer be included in the report. It may be that in such a listing, it is possible to determine the percentages of returned surveys by class. But if the report states that the total responses to the survey were 100 out of 200 sent without then specifying how many were sent to Class A and Class B shops and how many

were received from each class of shop, the report would be deficient. However, if the report states that 100 questionnaires were sent to A and 100 to B and 40 were returned for A and 60 for B that would be separate and distinct. The report may also note a 50% return rate overall but should also include that the return rate for Class A was 40% and for Class B was 60%. It may be that an insurer may find too few responses are received for one class, but not the other class.

There is no prohibition in submitting one (1) report that addresses the separate and distinct labor rate survey and describes separately the setting of the separate and distinct prevailing rate. No matter how the report is formatted, it must separately address Class A and B prevailing rates and state their calculations separately. It may be that the reasons are very similar, but the calculation for Class A and B prevailing rates must be separate and if surveys are not a basis for either rate the complete explanation – even if very similar to each other - must be given separately for each Class. Thus, the report would most likely include a section about the Class A prevailing rate and how it was calculated and whether it was based on the Class A surveys and, if not, why not, and have a similar section for the Class B prevailing rate.

a. Amtrust

In its report, Amtrust listed all auto body shops that it surveyed. It included a list of all shops surveyed and type of license. It also included a separate list for Class A and Class B shops indicating if a response was received to the survey and what was included (or not) in the responses. In its summary report to the Department, it did not break down the percentage response by type of class of license. Its report to the Department did not provide a separate basis for its determination of Class A and Class B rates to be charged. Even if the analysis is the same for each class, an insurer needs to ensure that a separate analysis is filed. Thus, while an insurer may rely on the

same or similar type of information, it needs to clearly delineate the responses received for each class and the bases thereto for its analysis.¹³

b. GEICO

GEICO filed separate documents for its Class A and Class B rate determination report. It indicated for each class of license how many shops were surveyed and how many responded. The separate reports provided how GEICO determined its rates and what each rate was based on. While GEICO may have determined the same rate for each class, the same rate is not prohibited as long as there is a separate analysis pursuant to R.I. Gen. Laws § 27-29-4.4(a)(2) and § 10.7(B)(6) and (7) of the Survey Regulation for each rate.

c. Hartford

Hartford included a list of all shops surveyed and each license type, but did not separate the percentage of survey responses received by class type nor did it provide a separate analysis for Class A and Class B. Even if the analysis is the same for each class, an insurer needs to ensure that a separate analysis is filed. Thus, while an insurer may rely on the same or similar type of information, it needs to clearly delineate the responses received for each class and the bases thereto for its analysis.

d. Liberty Mutual

In its report, Liberty Mutual listed all auto body shops that it surveyed. It included a list of all shops surveyed and type of license and in that list indicated if a response was received to the survey and what was included (or not) in the responses. In its summary report to the Department,

¹³ While it might seem formalistic to require that two (2) reports are filed when the analysis could almost be identical, the statute requires separate analysis and this requirement ensures that the analysis for each license type is clearly separate and understood. For example, the number of surveys returned will most likely always differ for Class A and Class B licenses. The reasons for not considering surveys could differ in some reports. A separate analysis for each class is required even if contained in the same document when filed with the Department.

it did not break down the percentage response by type of class. Its report to the Department did not delineate clearly the separate basis for its determination of Class A and Class B rates to be charged but it did determine a separate rate for each class. Even if the analysis is the same for each class, an insurer needs to ensure that a separate analysis is filed. Thus, while an insurer may rely on the same or similar type of information, it needs to clearly delineate the responses received for each class and the bases thereto for its analysis.

e. Main Street

In its report, Main Street did not include a list of all shops surveyed and type of license.¹⁴ In its report to the Department, it did not break down the percentage response by type of class but rather just provided an overall percentage of responses received. Main Street provided two (2) reports for Class A and Class B rates to be charged. The information and bases for determination were identical; however, the statute does not require that the rates be different or the reasons thereto be different, but rather provides that the process for each rate is shown separately and distinctly. While Main Street may have determined the same rate for each class, the same rate is not prohibited as long as there is a separate analysis pursuant to R.I. Gen. Laws § 27-29-4.4(a)(2) and § 10.7(B)(6) and (7) of the Survey Regulation for each rate.

f. Metropolitan

In its report, Metropolitan listed all auto body shops that it surveyed and the type of license each shop held. In its summary, it included the overall response rate but not the response rate by type of license. Its report to the Department did not provide a separate basis for its determination of Class A and Class B rates to be charged. Even if the analysis is the same for each class, an insurer needs to ensure that a separate analysis is filed. Thus, while an insurer may rely on the

¹⁴ That information is statutorily required to be included in a report. However, this issue is reviewing the analysis provided by certain insurance companies when setting their prevailing rates for Class A and Class B licenses.

same or similar type of information, it needs to clearly delineate the responses received for each class and the bases thereto for its analysis.

g. NICO

In its report, NICO listed all auto body shops that it surveyed. It included a list of all shops surveyed and type of license. It also included a separate list for Class A and Class B shops indicating if a response was received to the survey and what was included (or not) in the responses. In its summary report to the Department, it did not break down the percentage response by type of Class. Its report to the Department did not provide a separate basis for its determination of Class A and Class B rates to be charged. Even if the analysis is the same for each class, an insurer needs to ensure that a separate analysis is filed. Thus, while an insurer may rely on the same or similar type of information, it needs to clearly delineate the responses received for each class and the bases thereto for its analysis.

h. Ohio Mutual

Ohio Mutual listed all shops surveyed by license type and then provided a separate list for Class A and Class B shops that returned the surveys and indicating the rates stated on each survey and if each shop returned an accounting statement. However, its report to the Department did not provide a separate basis for its determination of Class A and Class B rates to be charged. Even if the analysis is the same for each class, an insurer needs to ensure that a separate analysis is filed. Thus, while an insurer may rely on the same or similar type of information, it needs to clearly delineate the responses received for each class and the bases thereto for its analysis.

i. Progressive

Progressive included a list of shops surveyed. It included a list of responses received noting each shop's license type. However, its report to the Department did not provide a separate basis

for its determination of Class A and Class B rates to be charged. Even if the analysis is the same for each class, an insurer needs to ensure that a separate analysis is filed. Thus, while an insurer may rely on the same or similar type of information, it needs to clearly delineate the responses received for each class and the bases thereto for its analysis.

Based on the foregoing, Amtrust, Hartford, Liberty Mutual, Metropolitan, NICO, Ohio Mutual, and Progressive violated R.I. Gen. Laws § 27-29-4.4(a)(2) and § 10.7(B)(6) and (7) of the Survey Regulation by failing to file a separate analysis for each class of license in setting their prevailing rates.

Based on the foregoing, GEICO and Main Street did not violate R.I. Gen. Laws § 27-29-4.4(a)(2) and § 10.7(B)(6) and (7) of the Survey Regulation as they filed a separate analysis for each class of license in setting their prevailing rates.

ii. Second Issue:

In order for the Hearing Officer to determine the aforementioned issues in paragraphs 9, 14, and 16 concerning an insurance company's rejection of survey responses received from auto body repair shops, the Hearing Officer must determine whether each Labor Rate Filing explained why the insurance company rejected consideration of the labor rate surveys submitted by the auto body repair shops in accordance with R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

The Survey Regulation requires a complete explanation of when the survey responses are not used as a basis for calculating the prevailing rate. It may be that some survey responses that are not rejected are then not considered and those must be listed with a reason given for not being considered. Thus, an insurer could send out 100 Class A surveys and receive 50 back. It could then reject five (5) of those 50 as being late and/or incomplete but must keep a record of those rejected subject to a Department audit. Then of those 45, it may decide that 10 cannot be considered and must give reasons why. Then for the remaining 35 responses that are considered, the insurer must decide whether to use them as a basis in setting the prevailing rate and if not, it

must give a complete explanation of why. An insurer could decide to “consider” all responses, but then not base the prevailing rate on the responses because they were incomplete, vague, or too few surveys were returned, *etc.* The issue of the explanation is that a complete explanation must be given. It may be that not everyone agrees that the reasons given were good reasons, but the requirement is only of a complete – a reason why - explanation. The “whys” could include reasons such as too few surveys were returned to be reliable, the responses did not include charged rates based on [fill in], and/or the rates given were much higher (or lower) than other information (e.g. research) showing [fill in].

a. Metropolitan

While Metropolitan did not provide a separate basis for its Class A and Class B rates, Metropolitan explained why it did not consider the survey responses. It explained that most shops in the returned surveys gave the posted rates rather than the rates actually charged¹⁵ and failed to provide supporting documentation and/or calculations supporting the shops’ rates. It is not necessary that everyone agrees with the explanation. The only requirement is a complete explanation is given.

b. Providence Mutual

Providence Mutual provided a list of all body shops surveyed indicating their license type and which shops responded to the survey. The survey indicated what the average rate for each class would be based on the survey responses. The survey then indicated why it established the prevailing rate it did (based on their experience); however, the survey failed to provide a reason that it did not accept the average rates obtained from the auto body labor rate survey.

¹⁵ The Complainants argued that the Respondents could not reject a survey because it did not list an insurer’s prevailing rate as a “charged” rate. The survey collects information on what rates of labor repair shops charge. R.I. Gen. Laws § 27-29-4.4(a)(1)(i). Here, Metropolitan explained that it found the surveys gave a posted rate rather than a charged rate for each category of customer so were not reliable.

c. Travelers

Travelers provided a list of all auto body shops surveyed and a list of those shops that did not respond. It also provided a list of those that responded that it did not include for consideration along with a reason each response was not considered. The reason for all rejections was that the body shop did not provide a complete description of the documents that evidence each actual rate charge. In other words, Travelers did not believe that enough documentation was provided for the rate charged. (There was an additional reason for rejections for two (2) shops). The report included a list of the body shops whose survey responses were accepted and considered and what rates those shops charged. Travelers included the percentage returned of surveys separately for Class A and Class B. It explained that it did not rely on the surveys for which it gave consideration to because of a low rate of return of surveys (compared to the number sent out) and the rates given by shops were at odds with Travelers' own claim data. It is not necessary that everyone agrees with the explanation. The only requirement is a complete explanation is given.

Based on the foregoing, Providence Mutual violated R.I. Gen. Laws § 27-29-4.4(a)(4)(iv) and § 10.7(B)(3) by failing to give a reason(s) that the auto body questionnaires were not considered in setting its prevailing rate.

Based on the foregoing, Metropolitan and Travelers did not violate R.I. Gen. Laws § 27-29-4.4(a)(4)(iv) and § 10.7(B)(3) as they gave reasons that the auto body questionnaires were not considered in setting their prevailing rate.

iii. Third Issue:

In order for the Hearing Officer to determine the aforementioned issues in paragraphs 1, 2, 3, 7, 11, and 17 concerning data used in establishing a prevailing rate, the Hearing Officer must determine whether the consideration of factors besides auto body labor rate survey results, including but not limited to, contract rates, subrogation rates, and rates obtained in a geographical area outside of Rhode Island are prohibited under R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

As discussed above, R.I. Gen. Laws § 27-29-4.4((a)(3), limits what can be used in an auto body labor rate survey. It does not mention prevailing rate but is part of a listing about the auto body labor rate survey and (a)(3) speaks of the auto body labor survey. Whether the “in” is added or not, the result is still the same in that the items listed are not be used in an **auto body labor rate survey**. There is a difference between the auto body labor rate survey and the setting of the prevailing rate. The statute does not say insurers may not use the following in setting the prevailing rate. The prevailing rate definition does not exclude any factors. Indeed, the statute only requires that a description of the formula or method used to calculate the prevailing rate must be given. And by regulation a complete explanation must be given if the calculation or formula for the prevailing rate is not based on the results of the survey.

There are no statutory or regulatory limits in what is included in the calculation of the prevailing rate. Thus, an insurer can consider information from other states or subrogation rates or in-house research.¹⁶ The statute requires the process of setting the prevailing rate be explained and, if after considering the survey responses and the responses are not a basis for setting the prevailing rate, a complete explanation must be given for not relying on the surveys. The statute merely provides transparency in the use (or non-use) of the results of the auto body labor rate survey and transparency in how the prevailing rate is calculated. There is no mandatory methodology or limits other than that the prevailing rates are to be determined separately and a

¹⁶ Therefore, while the survey questionnaire cannot use rates of a different licensed class than those being surveyed and cannot include limited and special use licenses, those prohibitions are different from what the insurers can consider in setting their prevailing rates. The Complainants argued that the insurers cannot consider Class B shops when setting Class A rates. However, the statute has no such prohibition. Rather the insurance company only must explain how it calculated the prevailing rate (and give a reason(s) if it did not rely on the survey results).

complete explanation must be given if the prevailing rate is not based on the survey results. Based on the foregoing, outside factors are allowed in the consideration of the prevailing rates.¹⁷

Based on the foregoing there was no violation of R.I. Gen. Laws § 27-29-4.4 by Allstate, American Commerce, AMICA, Liberty Mutual, Nationwide, USAA, and Selective by considering data from sources outside of the auto body survey responses when determining a prevailing rate.

E. Equitable Estoppel

Some Respondents argued that the Respondents were in compliance with the 2016 surveys since the Department accepted those surveys pursuant to R.I. Gen. Laws § 27-29-4.4(a)(7). A similar argument was addressed in the order on the motions to dismiss. Then the Respondents argued that they relied on the issuance of Bulletin 2016-4 and the Department's acceptance of rates so that the Department is estopped from bringing an action.

The Rhode Island Supreme Court has held that

in an appropriate factual context the doctrine of estoppel should be applied against public agencies to prevent injustice and fraud where the agency or officers thereof, *acting within their authority*, made representations to cause the party seeking to invoke the doctrine either to act or refrain from acting in a particular manner to his [, her, or its] detriment. *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 767 A.2d 35, 39 (R.I. 2001) (citation omitted) (italics in original).

In addition, for a party to obtain equitable estoppel against a town, it must show that a "duly authorized" representative of the town made affirmative representations, that such representations were made to induce the plaintiff's reliance thereon, and that the plaintiff actually and justifiably relied thereon to its detriment. *Casa DiMario, Inc. v. Richardson*, 763 A.2d 607, 612 (R.I. 2000). See also *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1234 (R.I. 2000) ("key element of an estoppel is intentionally induced prejudicial reliance.") (internal citation omitted). However, "neither a government entity nor any of its representatives has any implied or actual authority to modify, waive, or ignore applicable state law that conflicts with its actions or representations." See *Romano*, at 39-40. See also *Technology Investors v. Town of Westerly*, 689 A.2d 1060 (R.I. 1997).

¹⁷ This is consistent with *Auto Body Ass'n* which found prior to the amendment of R.I. Gen. Laws § 27-29-4.4(b) that allowing the labor rate survey to be the sole determinant in establishing the prevailing rate would lead to an absurd result since such an interpretation would in effect permit rate-setting in the uncontrolled discretion of auto body shops.

The Department accepted the labor survey rates and posted them. There is nothing in the Bulletin 2016-4 that shows the Department made any affirmative representations to the Respondents that any challenges to the labor rates were precluded by the acceptance of the labor rate surveys. In any event, the Department does not have the power to waive or modify the applicable law and would not be acting within its authority if it tried to do so. Thus, the Department's acceptance and posting of the rates cannot be found to have waived any applicable law regarding the labor rate statute.

F. Violations and what Penalties are Allowed

Amtrust, Hartford, Liberty Mutual, Metropolitan, NICO, Ohio Mutual, and Progressive violated R.I. Gen. Laws § 27-29-4.4(a)(2) and § 10.7(B)(6) and (7) of the Survey Regulation by failing to file a separate analysis for each class of license in setting their prevailing rates.

Providence Mutual violated R.I. Gen. Laws § 27-29-4.4(a)(4)(iv) and § 10.7(B)(3) by failing to give a reason(s) that the auto body questionnaires were not considered in setting its prevailing rate.

This matter was brought as a consumer complaint which is allowed under the Hearing Regulation. It alleged violations by the Respondents of R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation in their 2016 auto body labor rate surveys. R.I. Gen. Laws § 27-29-4.5 provides that an insurer's failure to comply with any requirements of R.I. Gen. Laws § 27-29-4.4 or any Department regulation thereto shall result in a fine of up to \$5,000. R.I. Gen. Laws § 42-14-16 provides for various penalties any violation of Title 27 which includes R.I. Gen. Laws § 27-29-4.4. R.I. Gen. Laws § 42-14-16 provides as follows:

Administrative penalties.

(a) Whenever the director shall have cause to believe that a violation of title 27 and/or chapters 14, 14.5, 62 or 128.1 of title 42 or the regulations promulgated thereunder has occurred by a licensee, or any person or entity conducting any activities requiring licensure under title 27, the director may, in accordance with the requirements of the Administrative Procedures Act, chapter 35 of this title:

(1) Revoke or suspend a license;

- (2) Levy an administrative penalty in an amount not less than one hundred dollars (\$100) nor more than fifty thousand dollars (\$50,000);
 - (3) Order the violator to cease such actions;
 - (4) Require the licensee or person or entity conducting any activities requiring licensure under title 27 to take such actions as are necessary to comply with title 27 and/or chapters 14, 14.5, 62, or 128.1 of title 42, or the regulations thereunder; or
 - (5) Any combination of the above penalties.
- (b) Any monetary penalties assessed pursuant to this section shall be as general revenues.

G. Conclusion

This matter was remanded to make further findings of facts and to determine any specific violations by any of Respondents and to impose sanctions, if necessary.

In terms of possible sanctions, the Respondents did not believe they committed any statutory or regulatory violations. The Complainants requested prospective relief in that they were not seeking the 2016 rates to be re-calculated if any violations were found but requested the Respondents be ordered to comply with the statute and that an appropriate monetary penalty be imposed for any violations.

The statute was amended effective January 1, 2016 and included a change reflecting the statutory change that provided for Class A and Class B licenses. This matter serves to elucidate the statutory and regulatory requirements of the auto body survey and the resulting setting of the prevailing rates. It is for these reasons that it is not necessary to impose a monetary penalty on the insurance companies for violation of the statute and Survey Regulation. Rather the goal is to ensure compliance in future with the relevant statute and regulation. Obviously, noncompliance in future could be treated differently.¹⁸

¹⁸ While not all Respondents were found in violation of the statutory and regulatory requirements for the labor rate survey, this decision serves as a “road map” for all insurance companies that are statutorily required to conduct auto body labor rate surveys, set prevailing rates, and file labor rate survey reports with the Department.

Therefore, pursuant to R.I. Gen. Laws § 43-14-16(a)(3) and (4), Amtrust, Hartford, Liberty Mutual, Metropolitan, NICO, Ohio Mutual, Progressive, and Providence Mutual are ordered to cease from such violations and to take such action necessary to comply with R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation in future.

VI. FINDINGS OF FACT

1. The Department issued Orders to the Respondents regarding the complaints filed by the Complainants. A status conference was held on May 5, 2017. The Respondents filed motions to dismiss to which the Complainants objected. On July 28, 2017, an order denying said motions to dismiss was entered. After a status conference, the Complainants and Respondents filed an agreed to stipulation and briefs in order to resolve this matter. The stipulation covered all issues in dispute. The parties agreed that this matter could be decided on the stipulation. The record closed on May 18, 2018.

2. On June 29, 2018, the undersigned forwarded a recommended decision to the Director which was modified by the Director on August 1, 2018 and remanded back to the undersigned for further findings of facts and conclusions of law. A status conference with the parties addressing the issues raised in the remand was held on September 17, 2018. By November 9, 2018, the parties all timely filed proposed findings of facts and conclusions of law. The decision dated August 1, 2018 is hereby incorporated by reference.

3. The facts contained in the initial stipulation, the further findings of facts set forth above, and any other facts contained Sections III, IV, and V are reincorporated by reference herein.¹⁹

¹⁹ The Complainants and Respondents submitted proposed findings of facts and conclusions of law. The undersigned reviewed all the evidence and proposed findings of facts and proposed conclusions of law and made determinations regarding the pertinent facts and conclusions of law as set forth above. Those are the finding of facts and conclusions of law.

VII. CONCLUSIONS OF LAW

Based on the foregoing:

1. The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*, R.I. Gen. Laws § 27-29-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and the Hearing Regulation.
2. The Respondents' filing of their 2016 labor rate survey reports with the Department did not waive the finding of any statutory or regulatory violations.
3. R.I. Gen. Laws § 27-29-4.4 requires that a separate and distinct written auto body rate survey for each classification of auto body shops established by R.I. Gen. Laws § 5-38-5 be conducted annually by certain insurers.
4. R.I. Gen. Laws § 27-29-4.4 requires that insurers must report to the Department a description explaining how each prevailing rate was calculated or determined for Class A and Class B licenses.
5. R.I. Gen. Laws § 27-29-4.4 does not mandate what must be considered by insurers in setting their prevailing rate for Class A and Class B licenses.
6. R.I. Gen. Laws § 27-29-4.4 does not prohibit an insurer's prevailing rate for Class A and Class B from being same.
7. R.I. Gen. Laws § 27-29-4.4 requires that insurers must keep a list of those auto body survey questionnaires not taken into consideration in their analysis and include the reason for not considering the response(s).
8. R.I. Gen. Laws § 27-29-4.4 requires that insurers must give a complete explanation why if returned questionnaires from their auto body labor rates surveys are not a basis for setting the prevailing rate.

9. Amtrust, Hartford, Liberty Mutual, Metropolitan, NICO, Ohio Mutual, and Progressive violated R.I. Gen. Laws § 27-29-4.4(a)(2) and § 10.7(B)(6) and (7) of the Survey Regulation by failing to file a separate analysis for each class of license in setting their prevailing rates.

10. Providence Mutual violated R.I. Gen. Laws § 27-29-4.4(a)(4)(iv) and § 10.7(B)(3) by failing to give a reason(s) that the auto body questionnaires were not considered in setting its prevailing rate.

11. GEICO and Main Street did not violate R.I. Gen. Laws § 27-29-4.4(a)(2) and § 10.7(B)(6) and (7) as they filed a separate analysis for each class of license in setting their prevailing rates.

12. Metropolitan and Travelers did not violate R.I. Gen. Laws § 27-29-4.4(a)(4)(iv) and § 10.7(B)(3) as they gave reasons that the auto body questionnaires were not considered in setting their prevailing rate.

13. Allstate, American Commerce, AMICA, Liberty Mutual, Nationwide, USAA, and Selective did not violate R.I. Gen. Laws § 27-29-4.4 by considering data from sources outside of the auto body survey responses when determining a prevailing rate.

14. All conclusions of law contained in Sections IV and V are reincorporated by reference herein.

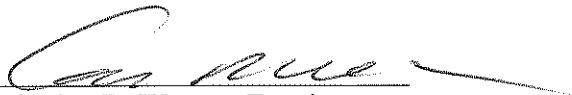
VIII. RECOMMENDATION

Based on the foregoing, the Hearing Officer recommends as follows:

Pursuant to R.I. Gen. Laws § 43-14-16(a)(3) and (4), Amtrust, Hartford, Liberty Mutual, Metropolitan, NICO, Ohio Mutual, Progressive, and Providence Mutual are ordered to cease from

such violations and to take such action necessary to comply with R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation in future.

Dated: December 11, 2018

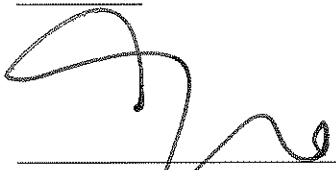

Catherine R. Warren, Esquire
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

- ADOPT
- REJECT
- MODIFY

Dated: 12/12/18


Elizabeth Tanner, Esquire
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 12th day of December, 2018 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and electronic delivery to –

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and by electronic delivery to Elizabeth Kelleher Dwyer, Deputy Director, and Matthew Gendron, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

