STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RHODE ISLAND 02903

IN THE MATTER OF:	:	
ABARI REQUEST FOR DECLARATORY RULING	:	**DBR No. 07-I-0228**
RESPONDENT.	:	

DECISION

This matter came to the Department as a result of a petition filed by the Auto Body Association of Rhode Island ("ABARI") requesting a declaration that the provisions of R.I. Gen. Laws § 27-29-4.4 require "…that the survey result be used to determine a prevailing labor rate as required by the statute, which does not allow for any other mechanism to determine and set such rate." (ABARI Petition 7-23-07 page 4). The Director accepted the petition under the provisions of R.I. Gen. Laws § 42-35-8.

R.I. Gen. Laws § 27-29-4.4 was enacted by the legislature in 2006. R.I. Gen. Laws § 27-29-4.4(6) required that the Department issue regulations concerning the statute. The Department held an extensive hearing and received comments from ABARI and numerous insurers prior to the enactment of Insurance Regulation 108 effective October 2, 2006. The issue presented by ABARI in this petition was not presented during those hearings. Upon receipt of the Petition, therefore, the Director determined that due process required that all persons who had previously expressed an interest in R.I. Gen. Laws § 27-29-4.4 be allowed to submit comments with regard to the Petition.

On August 3, 2007, the Director sent notice of the Petition to all persons who had submitted comments with regard to Insurance Regulation 108. That notice indicated that the Department would accept comments submitted by September 4, 2007. One of the interested persons asked for additional time to comment and, therefore, on August 31, 2007 an email was sent to those same persons indicating that comments would be accepted through September 14, 2007. On September 17, 2007 copies of all comments received were sent with notice that the Department would accept reply comments submitted by September 24, 2007.

Comments were submitted by ABARI, Nationwide Insurance Company, American Insurance Association (AIA), Amica Insurance Company, USAA, Liberty Mutual Insurance Company, Progressive Group of Insurance Companies, Allstate Insurance Company and Property and Casualty Insurers Association of America (PCI). Reply comments were submitted by ABARI and the Hartford. Comments to ABARI's reply on the issue of the unauthorized practice of law were submitted by AIA and USAA. The Department has considered all of these comments as well as the initial petition in the rendering of this Decision.

I.
Jurisdiction of the Department

The Department's jurisdiction in the matter is predicated upon the statutory requirement of R.I. Gen. Laws § 42-35-8 that each administrative agency have a procedure for issuing a declaratory ruling regarding statutes within that agencies' jurisdiction. The Department of Business Regulation has such a procedure in *Central Management Regulation 3*. The Petition in this matter was filed in accordance with the statute and regulation.

The issue of whether the Department has jurisdiction to rule in this matter was raised. AIA characterizes the Petition as "affirmative relief" outside of the Department's jurisdiction in accordance with *Liguori v. Aetna Cas. & Sur. Co.*, 384 A.2d 308, 312-313 (R.I. 1978). The Department does not believe that *Liguori* divests it of jurisdiction in this matter. Subsequent to the Decision in *Liguori*, the legislature amended R.I. Gen. Laws § 42-14-16 to add section (4) which allows the Department to "[r]equire the licensee …to take such actions as are necessary to comply with title 27 …or the regulations thereunder…" As the Superior Court recognized in *Blue Cross & Blue Shield v. McConaghy*, 2002 W.L. 393692 (R.I. Super. 2002), this amendment to R.I. Gen. Laws § 42-14-16 allows the Department to enforce the provisions of Title 27 against its licensees. Therefore, if the Department were to find that R.I. Gen. Laws § 27-29-4.4 required the action advocated by ABARI, the provisions of R.I. Gen. Laws § 42-14-16(4) would allow it to require that insurers comply with the statute.

Liberty Mutual advocates that ABARI's opportunity to challenge the Department's interpretation of this statute was by appeal of Insurance Regulation 108. As noted below, neither ABARI, nor any other commentator to Insurance Regulation 108 offered the interpretation of R.I. Gen. Laws § 27-29-4.4 being advocated by ABARI in this Petition. While the Department agrees that the issue should have been raised in conjunction with the adoption of Insurance Regulation 108, the fact that it was not does not bar consideration of the issues by the Department. As such, the Department will accept jurisdiction of this matter to fully address its interpretation of R.I. Gen. Laws § 27-29-4.4.

II.
Standard of Review

ABARI advocates that the rules of statutory construction are not applicable in this matter because the statute is clear and unambiguous. The Department cannot agree. If the statute included language such as "insurers must pay whatever amount is reported to them in the Auto Body Labor rate survey" the intent advocated by ABARI would be clear and unambiguous. Far from such clear language, ABARI's petition is based upon application of the definition of "prevailing labor rate" to another line of the statute. As mentioned above, at no time during the hearing or submissions with regard to Insurance Regulation 108, which implements R.I. Gen. Laws § 27-29-4.4, did any party advocate that R.I. Gen. Laws § 27-29-4.4 required that insurers set the labor rate they pay based solely on the Labor Rate Survey. Numerous commentators have noted the statement in the Concise Explanatory Statement issued in accordance with R.I. Gen. Laws § 42-35-2.3 at the time of adoption of Insurance Regulation 108. The Department stated that it was rejecting a number of the suggestions of insurers because "…the Department believes that the statute is clear that insurers are not required to pay the labor rates reported in the questionnaires."

When one reviews R.I. Gen. Laws § 27-29-4.4 the first thing that is readily apparent is that it is not "unambiguous." A great deal of statutory construction was required in order for the Department to properly implement the statute under Insurance Regulation 108. For example, the statute indicates that licensed insurers writing "motor vehicle liability insurance" must conduct the survey and report to the Department. However, in Rhode Island there is no line of insurance called "motor vehicle liability insurance." Further, hundreds of insurers are "licensed" in Rhode Island but do not

actually write any insurance and, therefore, do not pay any automobile damage claims. However, utilizing the rules of statutory construction, the Department was able to interpret the legislature's meaning and in Regulation 108 applied the section to all insurers writing more than 1% of the Rhode Island market in private passenger automobile insurance lines. Additionally, the statute utilized the word "survey" in more than one context. Section (a)(2) and (3) use the word "survey" to refer to the document sent to auto body shops, yet Section (6)(i) refers to the same document as a "questionnaire." Section (4) refers to the information that must be reported to the Department under Section (5), but refers to that document as a "survey." Again, using the rules of statutory construction, the Department was able to clarify that "surveys" be sent to auto body shops and a report of the analysis of those surveys be filed with the Department. As such, it cannot be found that the statute is "clear and unambiguous" and the Department must, therefore, turn to the rules of statutory construction in determining the meaning of R.I. Gen. Laws § 27-29-4.4.

In construing statutes the Department "…examine[s] the entire statute to ascertain the intent and purpose of the Legislature." *Cummings v. Shorey*, 761 A2d 680, 684 (R.I. 2000) The statute should be interpreted "…as a whole, making every effort to effectuate the legislative intent." *Smiler v. Napolitano*, 911 A.2d 1035 (R.I. 2006) (*citing State v. Grayhurst*, 852 A.2d 491, 516 (R.I. 2004)) When faced with two possible constructions of a statute, where "…one construction of an act of the Legislature operates to defeat an otherwise legitimate legislative intendment while another serves to support it, we will adopt the latter construction." *Tiverton v. Fraternal Order of Police*, 118 R.I. 160, 372 A.2d 1273 (1977) (*citing State v. Sprague*, 113 R.I. 351, 355, 322 A.2d 36, 38 (1974)) In

construing the intent of the legislature the enactment must be considered "…in its entirety and by viewing it in light of circumstances and purposes that motivated its passage." *Brennan v. Kirby* 529 A.2d 633, 637 (R.I. 1987). The statute should not be construed to "render sentences, clauses, or words surplusage." *State v. Gonsalves*, 476 A.2d 108, 110-111 (R.I. 1984). When apparently inconsistent statutory provisions exist, every attempt should be made to construe and apply them so as to avoid the inconsistency and should not be applied literally if to do so would produce patently absurd or unreasonable results." *State v. Goff*, 110 R.I. 202, 205, 291 A.2d 416, 417 (1972) This concept applies where "…apparent inconsistencies exist within the same statute or enactment." *Fraternal Order of Police, supra* at 637.

III.
Intent of the Legislature

The petition advanced by ABARI requests that the Department declare that R.I. Gen. Laws § 27-29-4.4 requires that "…a prevailing rate must be set my (sic) an insurer, and that the only way to set such rate is by the survey created by the Department in Regulation 108." (ABARI Supplemental Memorandum, 9-14-07, page 1) ABARI's position is predicated on R.I. Gen. Laws § 27-29-4.4(2) which provides:

> Each insurer must conduct an auto body labor rate survey, in writing, annually to determine a prevailing auto body labor rate for fully licensed auto body repair facilities.

ABARI argues that the word "determine" makes this a directive that the labor rate survey is the sole method by which an insurer may set a labor rate. As further evidence of this intent, ABARI refers to the definition of "Prevailing Auto Body Labor Rate" in R.I. Gen. Laws § 27-29-4.4(1)(ii), which defines the term as "…the rate determined and

set by an insurer as a result of conducting an auto body labor rate survey in a particular geographic area, and used by insurers as a basis for determining the cost to settle automobile property damage claims."

There are, however, alternative interpretations of these terms. The words "determined" and "set" are modified by the phrase "by the insurer." ABARI's interpretation would not require a determination or setting by the insurer since the insurer would simply accept whatever rate is reported. Additionally, the sentence provides that the survey is to be used as "…a basis…" in that process. If the legislature intended that no other information would be considered, the phrase "the basis" or "sole basis" rather than "a basis" would be used.[1]

Reference to other provisions of the statute do not support ABARI's advocated interpretation. For example, the definition of "auto body labor rate survey", a term used in R.I. Gen. Laws § 27-29-4.4(2), requires "…an analysis of information gathered…" If the meaning of R.I. Gen. Laws § 27-29-4.4(2) is simply payment of the amount reported, no "analysis" by the insurer would be necessary.

Further, the interpretation advocated by ABARI renders the provisions of R.I. Gen. Laws § 27-29-4.4(4)(iii) and (iv) meaningless. Those two provisions require that the insurer report "the prevailing rate established by the insurer" and "the formula or method used to calculate or determine the specific prevailing rate reported." If the insurer were simply required to pay the rate reported in the survey there would be no

[1] The Department does not accept ABARI's interpretation of the pronoun "a." ABARI argues that the pronoun "a" is used "…because there are several other components of such claims including but not limited to parts, materials, paint, taxes, hazardous waste disposal charges, etc." (ABARI Memorandum of Law dated 9-24-07, page 4). The statute, however, only concerns labor rates. If the statute had a directive as to a given labor rate it would certainly not exclude an auto body shop from charging for the items listed.

reason to report what prevailing rate was established nor what "formula or method" was used since the statute already set forth the only formula or method which could be used.

The interpretation advocated by ABARI raises a number of other practical concerns. The surveys were sent to all fully licensed auto body shops, except those with whom the insurer had a contract, but only some responded. The Comments in this declaratory relief petition reported response rates of 25.8% (Hartford), 27.8% (USAA) and 34% (Progressive), with many of the responses not including enough information to be included in the analysis. What rate is to be paid to those shops that did not respond? If different shops responded with different amounts, does the insurer have to pay the amount reported by each shop? What about insurers who were not required to conduct the survey (since they had less than 1% of the market); do they simply pay whatever the market will bear? What does an insurer pay to a shop with whom it contracts which it is prohibited from including in the survey under R.I. Gen. Laws § 27-29-4.4(3)?

There is no question that the information received from the survey must be taken into consideration by the insurer as one element in its decision making process. A wholesale rejection of the information without basis may constitute a violation of the statute. However, an interpretation that the insurer must pay whatever is reported by the shops is not supported by the statutory language.

When the government interferes with the freedom of private parties to contract, by requiring one private party to pay a specified amount to another private party, the legislature does so with a great deal of specificity and provides assurances to the party required to pay that the rate they must pay is based upon the costs of the service. This most often occurs in regard to monopolistic public utilities. As evidenced by Rhode

Island's public utilities law, the legislature provides an extensive process that assures that utility customers pay what it costs the utility to deliver the service. *See generally*, Rhode Island General Laws Title 39. The same can be said for the Department's approval of insurer rates. Insurers must file a great deal of financial and actuarial information before they will be granted approval of the rates they charge to consumers. ABARI's interpretation of R.I. Gen. Laws § 27-29-4.4 would have the government require insurers to pay, not an amount determined to be the cost of the service provided, but the amount reported to it by the provider of the service. This amount would ultimately be passed through to the insurance consumers of Rhode Island without any analysis that this is actually the cost of the service provided. The express language of the statute clearly supports the Department's position that the legislature did not intend such a result.

Reading R.I. Gen. Laws § 27-29-4.4 as a whole, the clear legislative intent is to require insurers to consider information submitted by auto body shops on labor rates and to provide public information on how the labor rates are set. As expressed on pages 11 and 12 of ABARI's reply brief, the legislature had been confronted with years of acrimony between ABARI members and insurers. One of the most contentious points was the "labor rate" paid by insurers to automobile body shops who repaired vehicles after accidents for which the insurer was liable under either first or third party claims. The intent of this statute was to provide additional transparency to the process. ABARI reports that some insurers have recently increased the labor rates they pay, which would appear to have effectuated ABARI's intent when it introduced the statute.

In promulgating Insurance Regulation 108, the Department did not interpret R.I. Gen. Laws § 27-29-4.4 to be anything more than additional information insurers must

take into consideration in setting labor rates. In fact, the Department rejected a number of the requests of insurers for proof of the rate reported by the auto body shop for precisely the reason that the statute did not require that the insurer pay the rate reported. Had the Department been in agreement with ABARI's currently espoused position, it would have detailed the directive to insurers in the regulation and required that auto body shops support the rate reported with extensive financial information.

ABARI argues that their position was the position of the Department at the time of adoption of Insurance Regulation 108. ABARI points to the Departments rejection of insurer request to alter the statutory definition of "prevailing labor rate" and its rejection of a specific section expressing that other data may be used in the calculation of a labor rate as evidence that the Department agreed that that definition required that the insurer actually pay the labor rate reported. This is not a correct statement of the Department's intent; in fact; the opposite is true. The Department declined to amend the statutory definition or to add a section allowing the use of other data to set the labor rate, in part, because it was the Department's position that the statute did not require payment of the amount reported in the surveys as evidenced in the Concise Explanatory Statement.

The Department does not agree with ABARI's contention that Section 7(3)(h) of Insurance Regulation 108, to which ABARI raised no objection at the time of adoption, is only applicable in cases where the insurer receives no responses to the surveys sent to auto body shops. If that were the case, and the Department did not believe that the section had general applicability, it would have said so. Section 7(3)(h) reflects the Department's position that insurers may base the labor rate they pay on factors other than

the survey but if they do so, they must provide "a complete explanation as to why it is not so based."

Finally, ABARI points to the fact that in the Concise Explanatory Statement, it indicated that the Commercial Licensing division may require auto body shops to support the veracity of the responses contained in the surveys. The reason for this statement was to notify auto body shops, which are also licensees of the Department, that the Department will not tolerate invalid information from any of its licensees and may take action against their license if such information is provided. This statement was never intended as a mechanism for the Department to determine the actual cost of service. Such review would require additional Department resources and expertise in determining a specific auto body repair shop's expenses. As the Department specifically stated in Insurance Bulletin 2007-1, "[a]t the hearing on the regulation a number of insurers requested that the survey include supporting documentation. Since this was simply a survey and not rate setting, the Department declined to include that level of detail."

Insurance is regulated to protect the insurance consumer. The Department is charged with assuring that the companies that are permitted to issue insurance policies to Rhode Island residents have sufficient financial solvency to pay the claims they have promised to pay in the issuance of the insurance policy. As a result, insurers are required to charge rates to consumers which are not "inadequate, excessive or unfairly discriminatory." "Inadequate" means that the rates must be such that they will allow for sufficient income to cover anticipated losses. The higher an insurer's costs, therefore, the higher the rates charged to the consumer. [2]

[2] The National Association of Insurance Commissions Automobile Database Report issued in 2007 indicates that Rhode Island has the highest average automobile repair cost per claim of any state in the

Automobile insurance in Rhode Island is a competitive industry. As part of its obligation to insurance consumers, insurers must reimburse a claimant to repair the claimants' automobile to pre-accident condition. When a claimant decides to have the vehicle repaired, an insurer which is liable for that claim pays for the service of auto body repair from licensed automobile body shops in Rhode Island. The market, therefore, controls the cost to the insurer, and ultimately all insurance consumers. If no fully licensed auto body shop is willing to repair a vehicle for the "labor rate" offered by an insurer, then the insurer must raise its labor rate to a point where it can obtain the service for the insurance consumer. In order to change this system, the legislature will have to specifically state that a competitive market no longer exists and that a Public Utilities style rate approval system will be implemented. They have not done so with this statute and the Department will not do so by interpretation.

IV.
Unauthorized Practice of Law

ABARI has advocated that four of the commentators engaged in the unauthorized practice of law prohibited by R.I. Gen. Laws § 11-27- 1 *et seq* as the submissions made by them were not made by an attorney licensed to practice law in Rhode Island. Interpretation of this criminal statute is in the exclusive jurisdiction of the Rhode Island Supreme Court. *In re Ferry*, 774 A.2d 62 (R.I. 2001). The Departments' consideration of this statute is solely to determine whether it can consider the comments submitted by persons who are not licensed Rhode Island attorneys. In relevant part R.I. Gen. Laws § 11-27-2 defines the practice of law as:

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nation. For automobile repair costs per claim Rhode Island's average was $2,818 in 2004, the most recent year for which information was available. This compares with a national average of $2,233. In 2003 Rhode Island's average was $2,005 with a national average of $2,191 and 37 states higher. In 2002 Rhode Island's average was $2,161 with a national average of $2,122 and 10 states higher.

> As used in this chapter "practice law" means the doing of any act for another person usually done by attorney at law in the course of their profession, and, without limiting this generality, includes:
>
> The appearance or acting as the attorney solicitor, or representative of another person…before any…department…authorized or constituted by law to determine any question of law or fact or to exercise any judicial power, or the preparation of pleadings or other legal papers incident to any action or other proceeding of any kind before or to be brought before the court or other body."

A corporation is a legal "person" and, therefore, if the Department had brought administrative action against any of these insurers and a person not licensed to practice law in Rhode Island advocated their position, the Department would agree that this was a violation of R.I. Gen. Laws § 11-27-5. However, in this case, the Department solicited comment from all "interested persons" which the Department defined as those who had submitted comments on Insurance Regulation 108. The Department does not consider commenting on proposed regulations to constitute the unauthorized practice of law and, in fact, has accepted comments on regulations from many individual members of ABARI who are not licensed to practice law in Rhode Island on many occasions. In fact, R.I. Gen. Laws § 42-35-3(a)(2) requires that prior to the adoption of any regulation, the Department must "[a]fford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing." The Department considers petitions for declaratory relief to be akin to public comment regarding a regulation. Persons submitting comments are not making an "appearance" or "representing" a party whose individual rights would be directly affected by the Department's order. Rather, those persons, even if they identify themselves as being associated with a corporation, are submitting comment to a declaratory ruling of general applicability to licensee.

As an administrative agency, the Department has a number of roles, only one of which is adjudication of the rights of individual licensees in administrative proceedings. In that role, the Department acts similar to a court, with the parties thereto either represented by counsel or appearing *pro se*. However, the Department has other roles which are not quasi-judicial in nature. Among those is the overall interpretation of statutes under its jurisdiction and the promulgation of regulations to implement those statutes. In these roles, any member of the "public" may state his or her views and is not limited to doing so through an attorney.

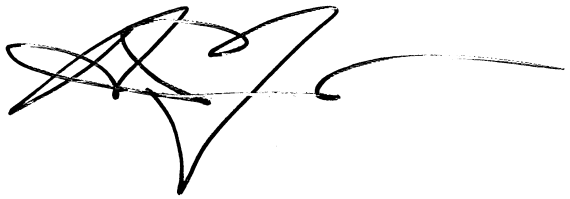
The Department has not found a case directly on point. However, the Department has considered the opinion in *Unauthorized Practice of Law Commission v. Department of Workers Compensation* 543 A.2d 662 (R.I. 1988). In *Unauthorized Practice of Law Commission,* the Supreme Court reviewed the legislature's enactment of a statute which allowed non-lawyer employees of the Department of Workers Compensation to represent and offer legal advice to injured employees appearing before the Department. While the Court indicated that this representation would be the unauthorized practice of law but for the statute, the court allowed the practice. In so ruling, the Supreme Court stated "[w]e must remember that the practice of law at a given time cannot be easily defined. Nor should it be subject to such rigid and traditional definition as to ignore the public interest." *Id*. The Court also noted that it had not interfered with the legislature's exceptions for certain persons to actually represent others in limited situations as set forth in R.I. Gen. Laws § 11-27-11.

In this case there is no civil, criminal or administrative proceeding pending which will adjudicate the individual rights of any individual or corporation. Therefore, even

though individuals who have submitted comments have indicated that they do so on behalf of corporations, the Department does not take this as an "appearance on behalf of" or legal representation of the corporation.[3] As such, the submissions do not constitute the unauthorized practice of law.

Therefore, it is hereby ORDERED that:

Petitioner's request that the Department find that R.I. Gen. Laws § 27-29-4.4 requires that the result of the labor rate survey be the only mechanism which an insurer can use to determine and set such labor rates for fully licensed auto body shops is Denied.



A. Michael Marques
Director
Dated: November 21, 2007

[3] This situation is distinguishable from a "contested case" under R.I. Gen. Laws § 42-35-9. A corporate entity must be represented by counsel in order to appear in a contested case.

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I.G.L. § 42-35-8. PURSUANT TO R.I.G.L. § 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.