RAIN AND HAIL INSURANCE SERVICE, INC.) **AGBCA No. 98-186-R**
(CR Partners and Jay Smith),)
)
Appellant)
)
Representing the Appellant:)
)
Frank W. Pechacek)
Attorney at Law)
Willson & Pechacek, P.L.C.)
P. O. Box 2029)
Council Bluffs, Iowa 51502)
)
Representing the Government:)
)
Kimberley E. Arrigo)
Office of the General Counsel)
U. S. Department of Agriculture)
Room 2449 South Building)
1400 Independence Avenue, S. W.)
Washington, D. C. 20250)

RULING ON APPELLANT'S MOTION FOR RECONSIDERATION

March 23, 1999

OPINION BY ADMINISTRATIVE JUDGE HOWARD A. POLLACK

This Motion for Reconsideration relates to this Board's July 10, 1998 decision, Rain and Hail Insurance Service, Inc., AGBCA No. 96-170-F, 98-2 BCA ¶ 29,874, upholding the right of the Federal Crop Insurance Corporation (FCIC), a Government corporation within the U. S. Department of Agriculture, to secure reimbursement from Rain and Hail Insurance Service (RHIS or Appellant) of West Des Moines, Iowa, of funds paid as reinsurance for crop losses on farm land found to be misclassified by RHIS as summerfallow.[1] The underlying appeal arises out of a Standard

[1] Since the issuance of the initial decision, Judge Seto retired from the Board and thus has been replaced on this decision by Judge Westbrook. The Board is mindful of the decisions of the General Services Board of Contract Appeals (GSBCA) in Integrated Systems Group, Inc. v. Department of Treasury, GSBCA No. 11214-P-R, and ICF Severn, Inc. v. National Aeronautics and Space Administration, GSBCA No. 11552-P-R, 1994 BPD 153, at 1 n.1 (July 14, 1994) (citing Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 n. 9 (Fed. Cir. 1986)),

Reinsurance Agreement (SRA) between FCIC and RHIS. The Board's decision was based on the determination that Appellant failed to meet the requirements for summerfallow. Under the contract, in order to qualify for designation as summerfallow, the acreage had to remain unplanted during the prior crop year, plant growth had to be terminated by June 1 (for Montana), and thereafter, the property had to be subject to a continuous mechanical or chemical weed control program. While the presence of weeds was a factor that supported the conclusion that the Appellant did not fully meet the necessary requirements, it was not the sole basis of the Board's decision. In that regard, stipulations of the parties as well as various observations also provided clear evidence that at a minimum the property had not been subject to a continuous weed control program, as required.

BACKGROUND

FCIC had reimbursed RHIS for insurance which RHIS paid out under a Multi-Peril Crop Insurance (MPCI) policy to its insured, CR Partners (CR), for property in Montana. FCIC had paid the reimbursement on the basis that the property had been properly classified as summerfallow rather than as continuous cropping. Some time after making the payment, FCIC learned that the property did not meet the requirements of summerfallow.

Briefly stated, RHIS, in the late spring of 1994, engaged in various conversations regarding issuance of insurance to CR, through RHIS's agent Donald Richman. At and during the time of CR's application process, CR was planning to lease the property to be insured. At the time of the application and for the prior crop year, the property had been owned and controlled by Stuart Farms. At issue in the appeal was the status of the property during the time it was held and controlled by Stuart.

Part of the process carried out by RHIS in issuing insurance to a party such as CR, is to determine a crop classification for the property. That affects the risk associated with the insurance. In this instance, there was doubt and hesitancy on the part of RHIS during the application process as to whether the property could properly be classified as summerfallow.
Consequently, after first speaking to its agent regarding insuring CR, an RHIS representative contacted and spoke with Mr. Robert Prchal (then head of the FCIC Regional Office in Billings, Montana) as to the matter of how to classify the property. Relying on what he had been told by Mr. Richman as to the condition of the property, the representative described the property to Mr. Prchal as having "some weeds." The representative also told Mr. Prchal that another independent agency of the Department of Agriculture, ASCS (Agricultural Stabilization and Conservation Service), which now is FSA (Farm Service Agency) as a result of a department reorganization, had determined

---

where GSBCA has held that on a matter of reconsideration, a board of contract appeals may not change the panel of judges to which the case is assigned. In Integrated Systems, two of the three participating judges were no longer available and in ICF Severn, none of the three judges were available. In contrast, in this appeal, two of the original panel members remain. Given that fact and the agreement of the two original judges to deny reconsideration, we need not decide here how we would handle the matter, absent an original majority. Board regulations at 7 CFR 24.2 require that Board decisions be rendered by a three-judge panel. That has been complied with in this reconsideration.

that the property was summerfallow. According to the representative, Mr. Prchal, then told him that whatever ASCS called it, he could call it.

Mr. Prchal had no specific recollection of the conversation. He did testify as to how he would have normally handled such a call and stated that for summerfallow, he would have needed to know conditions in the field, the state of the land and when the tillage operation had occurred. Further, the evidence was clear that the only information he had was what he had been told by RHIS in the conversation.

Therefore, while RHIS may have relied on Mr. Prchal's comment, it has not shown that Mr. Prchal waived the summerfallow criteria on this property. In deciding the appeal against the Appellant, we noted that if the Appellant was intending to rely on Mr. Prchal, then Appellant had an obligation to provide Mr. Prchal with full and accurate facts and further make clear to him what Appellant intended to do with any response he provided. That was not done.

There was considerable evidence to establish that the property was covered with extensive weeds. This was established through Ms. Tracey Harshman, Director of the Blaine County, Montana, ASCS; through various reports of other Blaine County ASCS officials (conducted during a default proceeding involving compliance with a different program); and confirmed by observations made by Mr. Richman in April 1994. The conditions seen by the parties clearly support the conclusion that the property had not been subject to a continuous weed control program after June 1, 1993, as was required to qualify as summerfallow. In addition, the lack of a continuous weed control program was implicitly acknowledged through stipulations agreed to by the parties. Those stipulations provided: (1) that while no crop was planted on the property in crop year 1993, Stuart did not use any physical tillage or chemical application to any land within the farm to remove plant growth from January 1993 through August 23, 1993, and (2) that although Stuart applied aerial chemical weed control from August 24-25, 1993, on most of the acreage with the remainder physically tilled in August, Stuart applied no further tillage or chemicals to any land from September through the end of the year.

Finally, as we stated in the underlying decision, not only did Mr. Prchal not have actual knowledge as to this property, but also he had no knowledge as to the specifics or basis of ASCS's classification of the property. He was not an official of ASCS and did not know the criteria ASCS used to make a classification. FCIC and ASCS were independent entities. Further, an ASCS classification was not based on an ASCS investigation but rather, as known by RHIS, was based on the self-certification of the farmer.

Finally, notwithstanding admitted concerns as to how they should classify this property and given knowledge of weeds several feet high, neither RHIS nor its agent spoke or sought information from the prior owner, Stuart. The fact there had been a falling out between Stuart and Richman does not excuse RHIS from securing the facts and does not shift the risk of assuring compliance to FCIC.

On August 6, 1998, Appellant filed a timely Motion for Reconsideration from the Board's decision. Reconsideration is discretionary with the Board and is not intended to permit a party to reargue its position or present additional arguments that could have been presented. See LDG Timber Enterprises , Inc., AGBCA No. 95-228-R, 94-1 BCA ¶ 26,329. In large measure, what Appellant offers here is such reargument. Nevertheless, we will address some matters raised by Appellant.

DISCUSSION

Presence of Weeds on the Property

The Appellant has contended that the Board unduly relied (1) on Blaine County FSA's issuance of a maintenance default on the property and (2) on Tracey Harshman's spot check of the acreage on December 1993. In particular, Appellant points out that FSA issued a maintenance default on what it characterizes as "only" 2,463.3 acres of the 4,247.5 total acres insured by RHIS. Appellant postures that a maintenance default on "only" 2,463.3 of the 4,247.5 acres supports a finding that the remaining acreage did not contain severe weeds and thus is at odds with the Board's conclusion that the weed condition was site-wide. Appellant also argues that Ms. Harshman did not examine 100 percent of the property.

First, as reflected in the underlying decision, there are numerous observations and indications of extensive weeds on the subject property. Further, as regards the maintenance default and Ms. Harshman, Appellant's arguments are unavailing. The maintenance default on 2,463.3 acres rather than the total acreage simply reflects the fact that Stuart Farm did not enroll 4,247.5 acres in the FSA program. Rather it enrolled only 2,463.3 acres in the conservation use program of FSA. (Appeal File (AF) 145-146.) It follows that FSA would not maintenance default on acreage that was not enrolled. To suggest that the default on 2,463.3 acres indicates that the remaining acreage was weed free has no factual support. Also, while Appellant may not find 2,463.3 acres, more than half of the acreage, to be considerable, we do. As to Ms. Harshman's observations, we did not take her testimony to be that she saw every acre of the property. She did, however, see considerable portions of the property and from that it is reasonable to conclude that what she saw was representative. We note that in making its challenge, Appellant fails, as it did throughout the trial and record, to produce affirmative evidence that clearly shows an absence of weeds and continuous weed control. Surely, if such evidence existed, Appellant could have presented it, which Appellant failed to do.

Improper and Inconsistent Treatment of Evidence as to Summerfallow

Appellant contends that the Board was inconsistent in relying on the Blaine County FSA's default findings but not giving similar weight and deference to FSA's classification of the property as summerfallow.

Again, on this issue, Appellant produces no basis for reconsideration. Simply put, there is no inconsistency. The FSA's information was derived from observations and investigations. The

classification of the property by ASCS as summerfallow carried none of those qualities. Rather, it was simply a recordation of the prior landowner's self certification. Mr. Richman and RHIS knew how the self-certifying process worked, yet, even in the face of their doubts as to whether the property qualified as summerfallow, they failed to secure information from Stuart, because the parties had experienced a falling out. Appellant's attempt to equate the reliability of the FSA investigation to an ASCS designation based on the prior landowner's self-certification is unreasonable.

Improper Weight Given to Richman Testimony

Appellant asserts that the Board unduly discredited the testimony of Mr. Richman, when it characterized his description of "some weeds" as being inaccurate and misleading. RHIS says that the Board implicitly found that Mr. Richman had an ulterior motive to classify the land as summerfallow, as opposed to continuous cropping, and that a conclusion of ulterior motive is inconsistent with Appellant and Mr. Richman contacting FCIC to determine what was the correct procedure under the circumstances.

The Board decision does not rest upon nor is it necessary to make a finding on Mr. Richman's motivation. At issue was whether the property did or did not meet summerfallow criteria. The evidence as set out above and in the underlying decision overwhelmingly depicted a severe and extensive weed condition. Accordingly, Mr. Richman's description of the property as having "some" weeds was clearly misleading.

Alleged Ambiguity in Definition of Summerfallow

RHIS makes the argument that the definition of summerfallow is ambiguous, as it allows some weeds on the land and does not require "black earth." According to RHIS, it is a deprivation of its rights when the FCIC's rules are inherently ambiguous and unclear. Appellant then cites some general case law as to treatment of "vague" regulations and as limitations on "unbridled discretion." However, the cases cited by it are not on point, given the facts in this case.

Although the definition of summerfallow may allow some room for interpretation (to the extent that summerfallow does not require a total absence of weeds), the facts in this case allow no ambiguity as to the critical finding that there were extensive weeds and that there had not been continuous weed control conducted on the property as required to meet the criteria for summerfallow. For Appellant to suggest otherwise ignores the evidence.

Board Should Have Found Estoppel Against Mr. Prchal

We will not here review or attempt to lay out what we see as RHIS's tortured attempt to find inconsistencies as a means to challenge our failure to find estoppel. Rather, we point out that the law is clear as to what elements must be met to succeed in an estoppel matter against a Government official. As we said in our decision, at least two of the elements, (1) the party knowing the facts and

(2) the party having the intent to have his actions or words be relied upon, were not established by Appellant. At best the evidence shows that Mr. Prchal was told that the property had "some weeds." Since that is not a true reflection of the property, he thus did not know the true facts as to the condition of the property. As to intent, we find no evidence that he knowingly would have or intended to give Appellant the green light to classify a non-conforming property as summerfallow. Accordingly, there is no basis to reconsider the estoppel matter.

Board Unduly Imposed Disproportionate Risk on Appellant

In RHIS's final argument, it says that the decision of this Board reallocates 100 percent of the risk of farmer error on RHIS in violation of the SRA. RHIS contends that under the terms of the SRA, losses are apportioned in accordance with various fund designations. These losses are partly borne by the FCIC and partly borne by the insurance company. While the Multi-Peril Crop Insurance policy allows insurers to recoup overpayments from its insured if the insured misreports information, the SRA is a contract between FCIC and the insurance company.

The Appellant continues that misreporting intimates fraudulent conduct on the part of the insured and that, therefore, a serious question remains whether an insurer can recoup overpayments from an insured who did not fraudulently, intentionally or recklessly misreport information and who paid its premiums accordingly. RHIS says that in the instant case, the insured was unaware of the acreage's classification as to one of summerfallow or continuous cropping and the information remained with the prior operator. It continues that the insured and the insurer sought classification through FCIC and thus acted properly and in such situation of unintentional error, the determination improperly places the entire amount of loss on the private company and that should not be allowed.

Appellant cites us to no provisions in the SRA upon which we can rely. Appellant presents an equity argument rather than a legal argument. The record indicates that Appellant's agent was not on speaking terms with the owner-lessor of the misclassified acreage and did not attempt to determine from the prior owner whether the land was in fact summerfallow for 1993 (FF 14). Further, Appellant is seeking reinsurance for an indemnity it paid for a crop loss that did not exist, since the estimated crop yield had been inflated by the misclassification.

RULING

Appellant's Motion for Reconsideration is denied.

_____

HOWARD A. POLLACK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D. C.
March 23, 1999