RAIN AND HAIL INSURANCE SERVICE, INC. (McQuaig, Insured),	)	**AGBCA No. 98-112-F**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Frank W. Pechacek, Jr. Bruce B. Green Willson & Pechacek, P.L.C. Attorneys at Law P. O. Box 2029 Council Bluffs, Iowa 51502	)	
	)	
Representing the Government:	)	
	)	
Michael E. Trow Office of the General Counsel U. S. Department of Agriculture 1734 Federal Building 1220 S. W. Third Avenue Portland, Oregon 97204-2825	)	

RULING ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

August 25, 1999

OPINION BY ADMINISTRATIVE JUDGE HOWARD POLLACK

This matter involves a dispute between Rain and Hail Insurance Service, Inc. (RHIS or Appellant) and the Federal Crop Insurance Corporation (FCIC). It is before the Board on FCIC's Motion for Summary Judgment, dated March 30, 1999. In an earlier ruling, dated February 19, 1999, Rain and Hail Insurance Service, Inc., AGBCA No. 98-112-F, 99-1 BCA ¶ 30,261, the Board denied an FCIC Motion to Dismiss the appeal for lack of jurisdiction predicated on FCIC's charge that Appellant was obligated to have certified its claim. We denied that motion, concluding that the regulations giving the Board jurisdiction over FCIC contract disputes do not require certification.

On March 30, 1999, FCIC filed this Motion for Summary Judgment. For purposes of judicial economy, we will not herein review the procedural facts which brought the matter to the Board. Those are set forth in our earlier referenced ruling. However, in brief summary, the appeal is from a dispute arising under a Standard Reinsurance Agreement (SRA) between FCIC and RHIS. The

dispute involves whether Appellant is properly entitled to reimbursement of an insurance indemnity of $100,215 which Appellant paid for sunburn damaged apples to John McQuaig (McQuaig), the insured, under a Multi-Peril Crop Insurance contract (MPCI) between RHIS and McQuaig.

In its motion, FCIC asks that we deny Appellant's claim for reimbursement. FCIC contends that RHIS' adjuster used an incorrect grading standard in determining the quantity of apples which qualified for indemnity under the MPCI. FCIC charges that RHIS included in its count, not only sunburn damaged apples (the damage which was properly subject to indemnity), but also included sunburn injured apples for purposes of indemnity. FCIC asserts that only sunburn damaged apples and not sunburn injured apples, qualified for indemnity payment. Second, FCIC contends that pack-out information, 8 months after RHIS adjusted the claim, conclusively established that RHIS incorrectly adjusted McQuaig's claim. RHIS contests the factual basis as to both issues.

The Appellant had insured the producer, McQuaig, against sunburn damage for 31,601 boxes of U.S. Fancy apples. Based on a field appraisal by Appellant, it determined there was an insured loss, with only 11,588 boxes of production to count toward the guarantee. Here, the insured had harvested the apples and put them in storage for later pack-out. After harvest, but before the pack-out, Appellant using a field appraisal, paid the insured the sum in issue for the sunburn damaged apples. At some point thereafter, FCIC conducted an audit and determined from the pack-out records that the actual production to count was 39,383 boxes, an amount greater than the guarantee of 31,601 boxes. We will not in this ruling further develop or explain the relationship or precise accuracy of the respective counts of the parties, other than to state, that if FCIC's facts were not disputed, then FCIC would be entitled to have its motion granted.

DISCUSSION

Appellant serviced McQuaig's 1995 apple crop pursuant to the terms of an MPCI contract. The "Sunburn Endorsement" to the MPCI policy provided that McQuaig would be insured for sunburn damage. More specifically, the endorsement stated, "except that apples which grade less than U.S. Fancy due solely to sunburn (or hail and sunburn) will be adjusted . . ." The total guarantee was 31,601 boxes of U.S. Fancy, fresh market apples at $5 a box. (Appeal File (AF) 92.) The parties agree that an apple that is classified as sunburn damaged, will not grade U.S. Fancy. According to the U.S. Standards for Grades of Apples, 7 CFR §§ 51.300-51.323 (January 1, 1996), in effect since July 30, 1964 (29 Fed. Reg. 10,573), U. S. Fancy apples are "free . . . from damage caused by . . .sunburn." 7 CFR § 51.301. Further, NCIS Loss Adjustment Manual, May 1995, reflects the policy and procedures of FCIC (and is incorporated by reference into the SRA), notes in pertinent part at, IV-3, Section B, Appraisals, (FCIC Exhibit B) the following:

> (d) When sunburn damage is apparent: grade reductions for sunburn will not be applied when apples are only INJURED by sunbum (51.300 & 301). Injury is a condition which does not materially detract from the appearance or edible/shipping quality of the apple.

The term "damage" as used in the insurance involved in this dispute also has a specific meaning in relation to sunburn and other defects. According to the Sunburn Endorsement to the MPCI policy,

> [d]amage means any specific defect . . . which materially detracts from the appearance, or the edible or shipping quality of the apple. The following specific defects shall be considered damage.
>
> (b) Sunburn . . . which has caused blistering or cracking of skin, or when the discolored area does not blend into the normal color of the fruit.

(Sunburn Endorsement, AF 116.)

Thus, the terms "damaged" and "injured" are not one and the same and must be distinguished for purposes of insurance. As such, an injured apple means one having any specific defect which more than slightly detracts, while a damaged apple means one having a specific defect which materially detracts. Applying that here, apples which are merely sunburn injured would qualify as U.S. Fancy (therefore would not be eligible for indemnity) while apples which are sunburn damaged would not qualify as U.S. Fancy and thus be subject to indemnity.

According to FCIC, when RHIS' adjuster conducted the appraisal of McQuaig's apples, RHIS' adjuster ignored the difference between damaged and injured. Consequently, by including in the count both injured as well as damaged apples, the appraiser incorrectly increased the apples subject to indemnity. Since what was insured was a guarantee of a certain number of U.S. Fancy apples, the only apples which should have been counted as being eligible for indemnity were those that met the standard for sunburn damaged (material defect) and not apples which were merely injured (slight defect).

In its motion, FCIC points to several instances where it says the loss adjuster has admitted that he included sunburn injured apples in his appraisal. It claims that those instances establish that the appraisal was in error. We will not here recite those instances. Rather, we turn to the affidavit of Appellant's appraiser, Bruce Matzke, which Appellant submitted in defense of the motion. He stated that in conducting the appraisal, he did not include injured apples but solely counted sunburn damaged apples. He stated that he adjusted the McQuaig apple claim in accordance with FCIC approved policies and procedures. He said that he selected a representative, random sample to adjust McQuaig's claim. He picked approximately 50 apples from each tree sampled, and inspected every square inch of each apple to determine whether there were any defects which had insurable loss or damage. All of the apples in his appraisal records of McQuaig's claim contained specific defects, due to sunburn, which he said "materially detracted" from McQuaig's apples. As such he appraised the apples as eligible for indemnity. In paragraphs 9 and 11 of his affidavit, he said that the apples, which he personally inspected and appraised, had defects which more than slightly and in fact materially detracted from the appearance of McQuaig's apples. It is clear from Mr. Matzke's affidavit that he is contesting the underlying basis of FCIC's case. Since this is before us on a

motion for summary judgment, we cannot resolve this motion in favor of FCIC because without question, the assertions in the affidavit establishes the existence of a material factual dispute.

In addition, FCIC points out that the pack-out information from the packing house, 8 months after RHIS adjusted McQuaig's claim, conclusively establishes that RHIS incorrectly adjusted McQuaig's claim. It appears undisputed that the packing house packed out 23,995 boxes of U.S. Fancy apples which, when combined with sunburned injured apples, results in a production count of 39,383 boxes. That exceeds the guarantee of 31,601 boxes and it would follow therefore that there is no insurable loss. However, Appellant contests whether the count by the packing house accurately reflects the respective numbers of damaged and injured apples. In that regard, Appellant presented an affidavit from Kelly Masters, an individual who described extensive previous experience in all facets of crop adjusting, as well as experience working for FCIC. He stated that the FCIC apple handbook and appraisal procedures require adjusters to appraise a sample of the insured's apple crop before harvest, after notification by the insured of a loss. He stated that prior to working for RHIS he was a grower of apples, and a member of the Board of Directors for Cowiche Growers, a packing warehouse. He described how a warehouse inspection for packing is carried out. He stated that pack-out information from warehouses/packaging facilities are not determinative of whether the apples were properly appraised, or whether any defects noted by the appraiser "materially" or "slightly" detracted from the appearance of the apple. He said that while warehouses inspect apples prior to packaging, these inspections are typically done by persons with little training on USDA standards who inspect the apples as they speed by on a conveyor belt. Workers do not pick up each apple and do not determine whether there are any injuries or defects to apples that may be hidden from view as the apples are passed through the conveyor. The sorting and packing lines at a packing house are designed for purposes separate and unique from that of crop insurance grading. Further, once apples are packed, tolerances within the apple packing industry allow significant percentages of substandard apples to be packed in a lot, while allowing the entire lot to grade U.S. Fancy or better. Depending on the packer; the quality of apples in any given year; as well as the target market; pack-out percentages may show higher than realistic amounts of production, when compared to production determined using FCIC adjustment procedures. This is especially so in short years where the demand for apples outweighs the supply of apples. Mr. Masters concluded that pack-out information from warehouse/packaging facilities are not determinative of whether the apples were properly appraised or determinative of the nature of the defects. Once again, dealing with the allegations in the context of a motion for summary judgment, we find that Appellant has clearly raised a material factual dispute over this matter.

The law is clear that when deciding a summary judgment motion, the evidence will be viewed in a light most favorable to the non-moving party and the trier of fact will draw all reasonable inferences in the non- moving party's favor. Where there is a dispute over material facts which must be resolved in order to decide the matter, the motion for summary judgment must fail. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248 (1986). That is the case here.

RULING

Accordingly, the Government's Motion for Summary Judgment is denied.

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HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
EDWARD HOURY
Administrative Judge

_____
ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D. C.
August 25, 1999