

RAIN AND HAIL INSURANCE SERVICE, INC.)	AGBCA No. 98-112-F
(McQuaig Compliance),)	
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Appellant)	
)	
Representing the Appellant:)	
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RULING ON GOVERNMENT'S MOTION TO DISMISS

February 19, 1999

OPINION BY ADMINISTRATIVE JUDGE HOWARD A. POLLACK

BACKGROUND

This dispute arises out of a 1995 Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC) and Rain and Hail Insurance Service, Inc. (RHIS) of West Des Moines, Iowa. The appeal is from a failure of FCIC to timely issue a determination on RHIS's request for a Director of Risk Compliance decision pursuant to 7 C.F.R. § 400.169(b) as to RHIS's claim that it should be reimbursed for a \$100,265 apple crop insurance indemnity payment made under a crop insurance contract. Also at issue is a \$1,981 premium overstatement.

The Board has jurisdiction over appeals from compliance determinations of FCIC pursuant to 7 C.F.R. § 400.169(b) and 7 C.F.R. § 24.4(b).

Title 7 C.F.R. § 400.169(d) states that appealable final administrative determinations of the FCIC under § 400.169(a) or (b) may be appealable to the Board of Contract Appeals (AGBCA). Title 7 C.F.R., Part 24 (b) states that the AGBCA shall have jurisdiction of appeals of final administrative determination of the FCIC pertaining to SRAs under 7 C.F.R. § 400.169(d).

FINDINGS OF FACT

1. RHIS insured John McQuaig, an apple grower, during the 1995 crop year under Multiple Peril Crop Insurance Policy No. 308164-95. McQuaig filed a claim of loss with RHIS alleging a covered loss to his 1995 apple crop.
2. In late October 1995, RHIS adjusted McQuaig's claim and determined that McQuaig sustained a covered loss, namely sunburn to his 1995 apple crop. RHIS paid McQuaig indemnity in the amount of \$100,215. Soon thereafter, FCIC paid to RHIS a portion of McQuaig's loss under the indemnity terms of the SRA between RHIS and FCIC.
3. Some time after RHIS paid McQuaig, FCIC brought a compliance action against RHIS. Thereafter, by letter dated July 1, 1997, FCIC, relying on a review of the matter by its Sacramento, California Compliance Field Office, issued an initial determination in which FCIC determined that RHIS should not have paid McQuaig's claim. FCIC further concluded that RHIS owed FCIC \$1,981 in overstated premium and \$100,215 in indemnity overpayments. In this letter, FCIC further stated that if RHIS did not agree with the determination, it could appeal in accordance with 7 C.F.R. § 400.169. It continued that the appeal was to be filed with the Deputy Manager of FCIC and had to be filed within 45 days of receipt by RHIS of the letter. The appeal addressed in the July 1, 1997 letter was a prerequisite to further appeal to this Board under 7 C.F.R. § 400.169.
4. RHIS disagreed with the FCIC's July 1 determination and by letter of August 13, 1997, requested review of that Compliance decision, pursuant to 7 C.F.R. § 400.169 (b). It is undisputed that 7 C.F.R. § 400.169 requires the Director of Compliance to issue a determination from a proper request and it is also undisputed that no such determination was issued in this matter.
5. With no determination being issued, RHIS, by Notice of Appeal dated November 24, 1997, filed its appeal with this Board seeking to overturn the FCIC decision. In that notice RHIS cited the Director's failure to issue a decision and asserted that the Board had jurisdiction under 7 C.F.R. § § 400.169 and 24.5, as well as under Board Rule 1(c) (7 C.F.R. § 24.2 1), which states in pertinent part:

Where the contractor has submitted a certified claim in excess of \$ 100,000 to the contracting officer and the contracting officer has failed to issue a decision within a

reasonable time, the contractor may file a notice of appeal, as provided in paragraph (a) of this Rule 1, citing the failure to issue a decision.

6. On December 10, 1997, the Board docketed RHIS's appeal on the basis of the failure of the Director of Risk Compliance Division (FCIC) to make final determination of RHIS's request for Director's review.

7. Thereafter, the Government filed a Motion to Dismiss dated January 29, 1998. In that Motion, the Government contends that the Board does not have jurisdiction over the matter asserting that the language of Rule 1(c), which deals with jurisdiction over failure to issue decisions, prohibits the Board from taking jurisdiction in this matter, since in order to invoke Rule 1(c), the Board (on a claim exceeding \$100,000) must first have before it a certified claim. In defining a certified claim, FCIC identifies that as the certification called for under the Contract Disputes Act (CDA), 41 U.S.C. § 605(c). FCIC, however, does not contend that the FCIC contract is a CDA contract but rather rests its claim on the basis that jurisdiction over FCIC matters is regulatory under 7 C.F.R. §§ 400.169 and 24.5, and more specifically, Rule 1(c) which is set forth in 7 C.F.R. § 24.21. While the Board, pursuant to regulation and statute, has jurisdiction over a number of subject matters, including CDA claims, debarments and FCIC appeals, the Board has but one set of rules.

DISCUSSION

In the motion before this Board, FCIC does not assert that the requirement for certification of claims over \$100,000 is applicable to FCIC through operation of the CDA. Rather, FCIC contends that the requirement for certification in an FCIC case, such as this, is derived from regulation, specifically Board Rule 1(c), which is set forth in 7 C.F.R. § 24.21. According to FCIC, since the Board's authority to accept a claim over FCIC's failure to issue a decision is derived from Rule 1(c), the Board, in exercising jurisdiction under the rule, is bound by all aspects of the rule, including the requirement that a claim over \$100,000 must be certified prior to the Board deeming the claim denied. Since, FCIC, in presenting this motion, has relied on regulatory authority, we do not at this time need to address or reach the issue as to whether and to what extent the CDA is applicable to an SRA, independent of the regulations.

The regulatory scheme, 7 C.F.R. § 400.169, under which this Board has jurisdiction over appeals from FCIC determinations, imposes a 45-day statute of limitations on an insurance company's request for a final administrative determination by the Director of Risk Compliance. The regulatory scheme does not specify a time within which the Director must make his or her determination. Further, there is no provision or direction anywhere in FCIC's regulatory scheme that calls for certification of claims as a prerequisite to a Director of Risk Compliance's determination nor as a prerequisite to the Board exercising jurisdiction over an appeal from such determination.

In fact, the matter of certification only comes up in this matter as a result of the parties each relying on Board Rule 1(c) as the basis and authority for the Board assuming jurisdiction over the failure to issue a decision matter in this case. While it is true that Rule I (c) does address jurisdiction over

"failure to decide" matters, and while it is further true that this Board has only one set of rules, and those rules apply to both statutory appeals (CDA) and regulatory matters (FCIC and debarments), it is equally evident that some rules are specific to particular proceedings and as such must be applied with that in mind. That is the case as to Board Rule 1(c), which specifically implements CDA requirements.

As FCIC counsel recognizes in his Motion, Rule 1(c) is derived from the statutory requirement in the CDA that provides that claims over \$100,000 must be certified in order to qualify as a claim subject to appeal. Similarly, the language relating to taking jurisdiction over a matter where a contracting officer fails to issue a decision, is also drawn from a requirement of the same Act. When one adds to that the absence of any certification requirement in the regulations dealing with FCIC claims and appeals, it becomes clear that it would be improper to attempt to incorporate specific CDA requirements into this regulatory proceeding.¹

As this Board addressed in Rain & Hail Insurance Service, Inc., AGBCA Nos. 97-173-F, 97-174-F, 97-175-F, 97-2 BCA ¶ 29,120, the Board's jurisdiction over an FCIC failure to issue a decision comes from the implicit requirement in 7 C.F.R. § 400.169, that FCIC, being directed by regulation to issue a determination from a submission to the Director of Risk Compliance, cannot indefinitely and unreasonably withhold that determination on a properly submitted claim. Accordingly, and as this Board provided in Rain & Hail Insurance Service, where FCIC has failed to issue a decision in a reasonable time, this Board will take jurisdiction over the matter, treating FCIC's failure to issue a determination as a denial of the insurance company's claim. It is that implicit denial which triggers the insurer's right to appeal to the Board in FCIC matters. That does not carry any requirement for certification. As this Board stated in Rain & Hail Insurance Service, Inc., in addressing the right of the Board to take jurisdiction over a claim which FCIC had failed to decide within a reasonable time from submittal, "Any other interpretation would render the insurance company's right to request a final determination illusory." Therefore, where FCIC fails to decide a properly submitted request for decision within a reasonable time, that failure by FCIC to make a determination in compliance with its regulations can be taken by this Board to constitute an appealable denial of the insurer's request. The Board has jurisdiction over denials and that jurisdiction is not created by Board Rule 1(c). Accordingly, there is no requirement in this matter for certification and the Board properly has jurisdiction.

RULING

¹ The Board is not required in resolving the motion to determine if the SRA dispute is governed by the CDA, in addition to the regulations. At issue here is the ability of an insurance company to obtain a Board decision based on the silence of the Director of Risk Compliance.

The Government's Motion to Dismiss is denied.

HOWARD A. POLLACK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
February 19, 1999