

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

William Riccard

98-00336

Name of Respondent

Prudential Insurance Company of America

REPRESENTATION

For Claimant: H. Robert Dowd, Esq. of the Law Offices of H. Robert Dowd, Altamonte Springs, Florida.

For Respondent Prudential Insurance Company of America ("Respondent"): Amy L. Bess, Esq., Sonnenschein Nath & Rosenthal, Washington, D.C.

CASE INFORMATION

Statement of Claim filed: January 15, 1998.

Claimant's Reply to Statement of Answer and Defenses to Statement of Claim: May 28, 1998.

Claimant's Objection to, and Answer in the Alternative to, Respondent's Response to Claimant's Reply: July 14, 1998.

Claimant's Submission Agreement signed: January 22, 1998.

Statement of Answer filed by Respondent: May 11, 1998.

Respondent's Response to Plaintiff's Reply to Prudential's Statement of Answer and Defenses to Statement of Claim: June 12, 1998.

Respondent's Submission Agreement signed: May 4, 1998.

HEARING INFORMATION

On August 27, 1998 and December 7, 1998, the arbitration panel conducted telephonic pre-hearing conferences lasting one session each.

On November 2, 1998, a pre-hearing conference lasting one (1) session was conducted with the Chairperson.

On December 14, 15, 16, and 17, 1998 and January 5, 1999, evidentiary hearings lasting eleven (11) sessions were conducted in Tampa, Florida.

CASE SUMMARY

Claimant alleged the following: The Claimant was employed as a Sales Manager by the Respondent from 1986 until the Claimant became disabled in 1995. Since the Claimant was a Sales Manager, as per the party's written agreement executed on January 6, 1986, Claimant was entitled to have his long-term disability benefit amount calculated at a Sales Manager rate. However, during the period where Claimant was on disability, the Respondent did not calculate the Claimant's disability benefits at a Sales Manager rate, but rather on a Sales Representative rate. Claimant further contends that the executed Sales Manager Agreement required a written amendment, signed by an empowered officer, before the agreed upon terms and conditions of the Agreement could be altered. Since there was no approved written agreement to the contrary made by one of the Respondent's officers, regarding any change of status to the Claimant's job title, and the Weekly Statement of Management Compensation indicated that the Claimant was considered to be a Manager as late as the week beginning August 5, 1996, the Claimant is entitled to disability benefits under a Sales Manager rate. Therefore, Claimant seeks approximately \$50,000.00 in unpaid past compensation to date, lost interest on that amount, court costs, attorney's fees, an order for the Respondent to pay future long-term disability payments computed at a Sales Manager's rate, and any other damages as the Panel may direct as a result of the Respondent's extreme and outrageous conduct in this matter.

Respondent alleged the following: Claimant alleges that Respondent breached their Sales Manager's Agreement by calculating Claimant's long-term disability benefits at a Sales Representative's rate rather than a Sales Manager's rate. Although styled as a breach of contract action, Claimant's cause of action is governed by ERISA, 29 U.S.C.A. 1001 et seq., since it involves the denial of benefits under Respondent's employee disability plan. Under ERISA, Claimant's claim fails because Prudential's decision to award him disability benefits at a Sales Representative's rate was not arbitrary and capricious. On June 27, 1995, almost three weeks before he first went on disability leave, Claimant voluntarily requested by letter that he be allowed to "step down" from his position as Sales Manager to a Sales Representative position. This request was appropriately processed by the company. Accordingly, when Claimant sought long-term disability benefits in August 1996, Respondent calculated Claimant's benefits at the

rate of a Sales Representative, relying, based on standard practice and procedures, on internal Respondent documentation which accurately listed Claimant's position as Sales Representative at the time of his initial disability leave.

Respondent further contends that Claimant's claim fails even if analyzed as a breach of contract claim. Claimant claims that his Sales Manager's Agreement was breached before he ever went out on disability, which occurred when Respondent changed Claimant's status to Sales Representative without the signature of a Respondent officer. However, Prudential notes that the unambiguous language of the controlling provision of Claimant's Sales Manager's Agreement (Section 591) states that "the Sales Manager's Appointment and this Agreement may be terminated by either party at any time." Respondent contends that a plain reading of this contract provision flatly contradicts Claimant's argument: the written approval of a Respondent officer was not required to terminate Claimant's Sales Manager Agreement after he himself requested that it be terminated. Therefore, Respondent properly returned Claimant to personal production without obtaining the written approval of an officer of the company, and Respondent's subsequent payment of long-term disability benefits at a Sales Representative's rate was thus appropriate.

RELIEF REQUESTED

Claimant requested: compensatory damages in the amount of \$50,000.00, interest, costs, attorney's fees, payment of future long-term disability payments, and any other relief the arbitration panel deems appropriate.

Respondent requested a dismissal of the Statement of Claim in its entirety, along with an award to the Respondent of costs, expenses, forum fees and attorneys fees.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

On or about July 14, 1998, Claimant filed a Motion to Dismiss Proceeding and Refer the Parties to the Remedies Provided by Applicable Law which was denied by the arbitration panel.

On or about November 2, 1998, Respondent filed a Motion to Leave to Amend its Statement of Answer and Defenses to Assert a Counterclaim Against Claimant. On November 30, 1998, the Panel denied Respondent's Request to Assert a Counterclaim against Claimant.

On or about November 14, 1998, Respondent filed a Motion to Postpone hearings scheduled for December 14, 1998, which was denied by the Panel.

On or about January 12, 1999, Claimant filed a Motion for Sanctions against Respondent which was denied by the panel at the hearing.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

Claimant's Statement of Claim is dismissed in its entirety.

The parties are to bear their respective legal fees and expenses.

FORUM FEES

Pursuant to Rule 10332(c) of the Code of Arbitration Procedure (the "Code"), forum fees in the amount of \$8,100.00 (13 sessions x \$600.00, plus 1 pre-hearing conference with the Chairperson x \$300.00) are assessed as follows:

Claimant is assessed the sum of \$8,100.00 for which NASD Regulation Inc. shall retain the \$600.00 hearing session deposit previously deposited by Claimant in partial satisfaction thereof, leaving a balance of \$7,500.00.

OTHER COSTS

Pursuant to Rule 10332(a) of the Code, Claimant has paid to NASD Regulation, Inc. the claim filing fee of \$500.00.

Pursuant to Rule 10333 of the Code, Respondent has paid to NASD Regulation, Inc. the \$800.00 member surcharge previously invoiced.

Pursuant to Rule 10333(d) of the Code, Respondent has paid to NASD Regulation, Inc. the \$600.00 pre-hearing process fee.

Pursuant to Rule 10333(d) of the Code, Respondent has paid \$556.25 to NASD Regulation, Inc. in partial satisfaction of the hearing process fee of \$1,000.00, leaving a balance due of \$443.75.

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Fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

Public/Industry

_____/s/_____
Paul L. Matecki, Esq.

Industry/Chairman

_____/s/_____
Clyde Renfroe

Industry/Panelist

_____/s/_____
Daniel B. Daugherty

Industry/Panelist

Date of Decision: March 1, 1999