

PERRY TRANSPORT, INC.
v.
MAINE EMPLOYERS' MUTUAL
INSURANCE COMPANY, et al.
Docket NO. INS-03-412

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DECISION AND ORDER

This is an adjudicatory proceeding convened by the Superintendent of Insurance pursuant to 24 A M.R.S.A. §§ 229 and 2320(3) and in accordance with the order of the Eighth District Court dated May 15, 2003 issued in the related civil action *Maine Employers Mutual Insurance Company v. Perry Transport, Inc.*, No. CV 02 238. The Petitioner, Perry Transport, Inc., contends that it was overcharged by its former workers' compensation insurer, the Maine Employers' Mutual Insurance Company ("MEMIC"), because MEMIC had classified the Petitioner's operations entirely in Code 7228 (Trucking: Local) rather than partially in Code 5506 (Paving) in the uniform classification system for workers' compensation insurance rating. Following an adjudicatory hearing before the Superintendent on July 25, 2003,¹ the Petition is denied, as discussed more fully below, because a retroactive reclassification of the Petitioner's operations is not required in the circumstances of this case.

Peter Perry operates two businesses in Poland, Perry Transport, Inc., the Petitioner, and Perry Transport, LLC, which is not a party. As the names suggest, both businesses involve transporting things. More specifically, the LLC carries merchandise by truck for firms such as Poland Spring, L.L. Bean, and Thomas Moser, while the Petitioner carries materials by truck for Pike Industries, a road building contractor. It is undisputed that the two Perry Transport entities have separate and distinct operations, using different equipment and employing different drivers.

Historically, both the Petitioner and the LLC were classified in Code 7228 (Trucking: Local), and the LLC remains in that classification. When the Petitioner first applied for coverage with MEMIC, effective March 29, 2000, this is the classification it requested. The application described the nature of the Petitioner's business as "Trucking (sand and gravel) – local and Excavation contractor). Subcontracting for Pike Industries." The 2001 renewal application continued to list the classification as Code 7228, and describes the business as "Sand & Gravel Hauling – Also hauls Contractors Equipment for Pike Industries." On audit, MEMIC found those descriptions to be accurate, and billed the Petitioner accordingly for the two policy periods at issue here, the full 2000–01 policy year and a partial year running from March 29, 2001 until November 6, 2001, the effective date of the Petitioner's replacement coverage with another insurance carrier.

Soon, though, the Petitioner began questioning this classification. Mr. Perry testified that he was talking with another trucker with the same type of operation, who paid less for workers' compensation insurance because he had a

split rate – that is, that some of his operations were billed as trucking, but other operations were billed at a lower rate as construction. More specifically, in a complaint filed with the Bureau of Insurance in December of 2002, the Petitioner explained: “Based on research, with the assistance of PTI’s insurance agent and others in the industry it is the insured’s contention that there exists a more appropriate labor classification (4000 – sand or gravel digging and drivers, and 5506 – street or road construction/paving), which he has seen on insurance [policies] for several of his industry competitors.”

According to the Petitioner, a clear distinction can be drawn between its sand and gravel hauling operations and its asphalt operations. While the sand and gravel trucks simply pick up materials at Point A and deliver them to Point B, asphalt delivery involves specialized equipment which is “married” to a paver and remains in the paving train for an extended period of time as the asphalt is being spread. Other equipment takes part in the “cold-planing” operation when old pavement is being removed, and then hauls the old asphalt to the plant for recycling. The Petitioner maintains records which allow the accurate allocation of payroll between operations, and the Petitioner’s current insurer accepts the distinction and rates the asphalt operations in Code 5506 (Paving). Furthermore, on April 11, 2003, National Council on Compensation Insurance (“NCCI”), the advisory organization designated by the Superintendent to administer the uniform classification system pursuant to 24 A M.R.S.A. § 2382-B, wrote MEMIC that based on the information it has received from the parties, the split classification is appropriate.

MEMIC disagrees, contending that NCCI’s ruling should be viewed as provisional and nonbinding, that it was based on incomplete and inaccurate information, and that it conflicts with NCCI’s own *Basic Manual*, the primary governing document for the workers’ compensation rating system,² which is based on the principle, as set forth in Rule 1(D), that “each classification includes all of the various types of labor found in a business. It is the business that is classified, not the individual employments, occupations or operations within the business.” However, the same Rule acknowledges that there are exceptions to this basic principle, one of which is found in Rule 1(D)(3)(b): “More than one basic classification may be assigned to an insured who ... conducts one or more of the following operations:” First on the list is “Construction or erection.” Although MEMIC contends that this rule does not apply because the Petitioner is not engaged in construction, this begs the question, since Code 5506 is expressly designated as a construction classification and therefore may be used for a split rating if it applies to the risk.

Whether that classification appropriately applies to this risk is a close call. Despite the importance of having a uniform classification system based on objective standards, the fact remains that the lines between classifications are inexact, and reasonable underwriters may disagree. Accordingly, the Insurance Code calls for the designation of a single advisory organization to administer the uniform classification system. In this case, however, the NCCI letter is

presented as an informal evaluation being offered into evidence by the Petitioner, not as a binding ruling being appealed to the Superintendent by MEMIC, nor has NCCI as a party to this proceeding taken a position on the record in support or opposition to the Petition.

Furthermore, the NCCI letter was sent more than a year and a half after the second MEMIC policy terminated. The issue in this case is not what classification (or classification) best describes the Petitioner's current operations, but whether MEMIC made a correct decision based on the information available to it at the time it conducted its premium audits on these two policies. Rule 1(F)(2) of the NCCI *Basic Manual* provides that "Corrections in classification that result in a *decrease in premium*, whether determined during the policy period or at audit, must be applied retroactively to the inception of the policy." (*Emphasis in original*) However, corrections made at the request of the policyholder are not made "at audit," and therefore apply prospectively rather than retroactively, unless the policyholder "contested the erroneous classifications within a reasonable time after audit." *Palmer Development Corp. v. NCCI*, No. INS-93-71 (Me. Bur. Ins. Dec. 22, 1993). *See also Sterling Appraisal Co. v. NCCI*, No. INS-94-11 (Me. Bur. Ins. Dec. 22, 1994); *Bowditch & Perkins Appraisal Services v. MEMIC*, No. INS-95-33 (Me. Bur. Ins. Oct. 20, 1995); *Colonial Plastering v. MEMIC*, No. INS-97-23 (Me. Bur. Ins. Apr. 16, 1998).

In this case, even if we accept the premise that the Petitioner's new classification represents a "correction" to the old classification rather than merely a difference in underwriting judgment, the Petitioner did not raise a timely challenge to the MEMIC audit sufficient to compel that this correction be made retroactively. Based on the information available at the time, MEMIC correctly determined that the Petitioner conducted the same operations described in the application, and that those operations could reasonably be characterized as short-haul trucking within the meaning of Code 7228. Although it is not directly on point, it is instructive that the *Scopes Manual* expressly states that Code 7728 encompasses businesses that operate concrete mixer trucks unless it is their own concrete that they are hauling, mixing, and delivering.

Although the Petitioner had concerns about that classification at the time the policy was in force, and now offers additional information that might arguably have led to a different result had the Petitioner submitted it to MEMIC at the time, the Petitioner did not contest the audit findings to the Superintendent pursuant to 24-A M.R.S.A. § 2320(3) or to NCCI pursuant to 24-A M.R.S.A. § 2320(2). Instead, the Petitioner simply replaced coverage with a carrier that agreed to use the more favorable classification.³ I therefore find that the new classification appropriately took effect upon policy replacement, not retroactively to the two policies in question.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that the Petition is *DENIED*.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 (2000) and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before October 6, 2003. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

AUGUST 25, 2003

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER

¹ Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decisionmaking authority.

² Pursuant to 24-A M.R.S.A. § 2382-B, workers' compensation insurers must adhere to a uniform classification system approved by the Superintendent and administered by the designated workers' compensation advisory organization. Pursuant to 5 M.R.S.A. § 9058, the Superintendent has taken official notice of both the NCCI *Basic Manual*, filed by NCCI pursuant to 24 A M.R.S.A. § 2382-B(3), and the NCCI *Scopes Manual* (formally entitled *Scopes of Basic Manual Classifications*), containing more detailed descriptions of the various classification codes. These manuals, to the extent that their provisions have been approved by the Superintendent, have the same legal effect as rules adopted by the Superintendent. *Imagineering, Inc. v. Superintendent of Insurance*, 593 A.2d 1050, 1052 (Me. 1991).

³ More precisely, the Petitioner ceased paying the premium on its policy and purchased new coverage once MEMIC cancelled for nonpayment. Unfortunately, this "self-help" procedure is widely used by employers, due to the short-rate surcharge which is imposed as a penalty for giving advance notice to the insurer.