DEPARTMENT OF INSURANCE
ADMINISTRATIVE HEARING BUREAU
45 Fremont Street, 22nd Floor
San Francisco, CA 94105
Telephone: (415) 538-4251

FILED

NOV 7 2001

ADMINISTRATIVE HEARING BUREAU

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of **DeMIRANDA MANAGEMENT COMPANY,** Appellant, From a Decision of **THE WORKERS' COMPENSATION INSURANCE RATING BUREAU,** Respondent.	FILE NO. ALB-WCA-00-39 **PROPOSED DECISION**

Introduction

Appellant DeMiranda Management Company (DeMiranda), a real property management company, appeals a November 16, 2000, experience rating decision of the California Workers' Compensation Insurance Rating Bureau (Rating Bureau or Bureau)[1] to the Insurance Commissioner (sometimes hereafter "commissioner") under Insurance Code section 11753.1,

[1] The Rating Bureau is a rating organization licensed by the Insurance Commissioner under Insurance Code, division 2, part 3, chapter 3, articles 2 (commencing with § 11730) and 3 (commencing with § 11750), to assist the commissioner in the development, administration, and enforcement of statutorily-mandated workers' compensation insurance classification and rating systems. The Rating Bureau serves as the commissioner's designated statistical agent, charged with the responsibility to gather and compile experience data for every workers' compensation policy extending coverage under the workers' compensation laws of California (Ins. Code, §11751.5).

subdivision (a).[2] The appeal presents the issue whether the Bureau properly determined for experience rating purposes that DeMiranda's September 15, 1998, purchase of all of the operating assets of JdM Management, Inc., (JdM) resulted in a material change in ownership and that the change in ownership was not accompanied by a material change in operations or employees, as defined in California Workers' Compensation Experience Rating Plan (Experience Rating Plan)[3] section IV, rule 1. For the reasons that follow, the Rating Bureau's decision is affirmed.

An evidentiary hearing on the appeal was conducted before Administrative Law Judge (ALJ) Michael D. Jacobs. Raymond A. Greenberg, Esq., represented appellant at the hearing. Appellant presented no witnesses at the hearing. John N. Frye, Esq., and Mary F. Griffin, Esq., represented respondent Rating Bureau. Eric S. Riley, manager of the Rating Bureau's Policy Examination Department testified on behalf of the Rating Bureau. The parties presented documentary evidence, filed post-hearing briefs, and submitted the matter for decision.

---

[2] Insurance Code section 11753.1, subdivision (a), provides that any person aggrieved by a rating organization's decision may appeal the decision to Insurance Commissioner. That subdivision authorizes the commissioner to deny an appeal made without good faith or lacking probable cause and requires the commissioner, otherwise, to hold a hearing to consider and determine the matter presented by the appeal. The Insurance Commissioner adopted and promulgated regulations governing hearing procedures in appeals brought under Insurance Code section 11753.1, subdivision (a) (Cal. Code Regs., tit. 10, §§ 2509.40-2509.77). The hearing in the instant appeal was conducted in accordance with the commissioner's regulations, which, at section 2509.57, incorporate the procedural guarantees enumerated in the California Administrative Procedure Act's Administrative Adjudication Bill of Rights (Gov. Code, §§ 11425.10-11425.60).

[3] The provisions of the Experience Rating Plan are incorporated by reference in the Insurance Commissioner's regulations. (Cal. Code Regs., tit. 10, § 2353.) The Plan, as a regulation adopted pursuant to the commissioner's delegated legislative authority (Ins. Code, §§ 11734, subds. (a) and (c), and 11736), has the same force and effect as a statute. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401.) The January 1, 1998, version of the Experience Rating Plan applies to the issues raised by this appeal because appellant's acquisition of JdM's assets occurred during 1998.

Findings of Fact

On September 15, 1998, appellant purchased all the physical assets of JdM, a real property management firm, and took over JdM's operations. The operations included the management and maintenance of apartment complexes owned by separate concerns.

Appellant purchased a workers' compensation insurance policy, number WC8158868 B, effective September 15, 1998, to September 15, 1999, from Safeco Insurance Company (Safeco) covering the property management operations appellant acquired from JdM. When JdM sold its assets to appellant, JdM had a workers compensation insurance policy and based on JdM's payroll and loss history, a 118 percent experience modification applied to its premium. Safeco used the payroll and loss experience developed under JdM's insurance policy in rating appellant's policy and, based on that experience, applied a 118 percent experience modification to appellant's insurance premium.

JdM's workers' compensation insurance coverage ended on September 30, 1998, and JdM thereafter did not purchase a workers' compensation insurance policy.

Appellant's Safeco policy recites the following terms regarding retention and inspection of records affecting DeMiranda's policy premium:

> You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them. [¶] You will let us examine and audit all your records that relate to this policy. These records include . . .payroll and disbursement records. . . . Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

On December 20, 1999, appellant's corporate president, Michael J. Tramontin, wrote to the Rating Bureau and requested the Bureau to remove the 118 percent experience modification Safeco had applied to appellant's policy premium. Tramontin's letter and a completed ERM-14

form he included with the letter state that appellant purchased all of the assets used by JdM in the operation of its property management business and that appellant took over JdM's former operations. Tramontin's letter also states that a 77 percent turnover of Jdm's staff employees occurred after appellant acquired JdM's operations. In an addendum to the ERM-14 form, Tramontin states that appellant employed only five of JdM's former staff employees, including two accounting clerks, two secretaries and a property supervisor. Tramontin's letter provided no information to the Rating Bureau about other DeMiranda employees who may have been employed by JdM before the acquisition.

On May 1, 2000, the Rating Bureau wrote to appellant's then workers' compensation insurer, Legion Insurance Company, in response to the complaint Tramontin made on appellant's behalf regarding appellant's experience modification.[4] The Rating Bureau's letter, a copy of which it sent to appellant, requests information that would enable the Bureau to apply the relevant provisions of the Insurance Commissioner's regulations. The Bureau's letter accurately describes the regulatory scheme governing experience rating where a change in ownership has occurred:

> Section IV of the Experience rating Plan outlines the rules which govern the promulgation of experience modifications in those instances where entities undergo changes in ownership. . . . [¶] Section IV, Paragraph 1, of the Experience Rating Plan directs that the experience of the prior owner shall be used in the new owner's experience ratings unless the change in ownership is accompanied by a "material change" in operations or employees. The Experience Rating Plan provides that a material change in employees occurs when: (1) a majority of the employees who conducted the operations 90 days subsequent to the material change in ownership were not employed during the 90 days prior to the change; and (2) a majority of the payroll earned during the 90 days subsequent to the sale was paid to employees who were not employed to conduct such operations during the 90 days immediately preceding the change in ownership.

[4] The Bureau's May 1, 2000, letter states that it replies to correspondence from Tramontin dated April 15, 2000. The parties did not proffer a letter bearing that date at the hearing.

The Rating Bureau's May 1, 2000, letter requested copies of "complete payroll records, by employee, for DeMiranda Management Company for the 90 day period (prior to and subsequent) to the September 15, 1998 change in ownership" to enable the Bureau to confirm whether a material change in employees accompanied the material change in ownership. Legion Insurance Company did not respond to the Bureau's May 1, 2000, written request for payroll records and failed to reply to the Bureau's subsequent requests for relevant payroll records in letters dated June 19, 2000, July 18, 2000, August 14, 2000, and September 19, 2000. The Bureau sent copies of those letters to appellant, to Tramontin's attention.

In October 2000, the Rating Bureau received a letter, bearing the date August 11, 2000, from appellant's legal counsel promising that DeMiranda would "willingly cooperate by producing its records" but refusing to produce "somebody else's records," presumably referring to JdM's payroll records. The promise to cooperate, however, was a hollow one; DeMiranda failed to provide copies of its own payroll records to the Rating Bureau.

On October 10, 2000, the Rating Bureau wrote to appellant, through its attorney, citing the Rating Bureau's authority to request "'all information relevant to a complete analysis of a risk's ownership and/or operations, to insure the proper application of an experience modification in accordance with this Plan.' ([Experience Rating Plan] Section 1, Rule 3.)" The Bureau informed appellant that it would process appellant's acquisition of JdM's assets as a material change in ownership with no change in status unless appellant provided information to the contrary.

On October 16, 2000, appellant's attorney sent a letter to the Rating Bureau in reply to the Bureau's October 10, 2000, letter. Counsel's October 16, 2000, letter provided no information or records regarding the change in status issue and, without mentioning appellant's

previous promise to provide its own records to the Bureau, asserted that the Rating Bureau had no authority absent a warrant or subpoena to obtain any records from appellant.

On October 18, 2000, the Bureau sent appellant its written decision that the payroll and loss data for JdM applied to appellant for experience rating purposes, explaining the reasons for its decision. On November 1, 2000, appellant served the Rating Bureau with a request for reconsideration of the Bureau's October 18, 2000, decision. The request for reconsideration contained no records or other evidence regarding appellant's workers' compensation insurance experience rating. Appellant's reconsideration request asserts that the Rating Bureau's regulatory authority to request information relevant to a risk's ownership and operations violates the Fourth and Fifth Amendments to the United States Constitution. On November 16, 2000, the Rating Bureau denied appellant's request for reconsideration. This appeal to the Insurance Commissioner followed.

Discussion

Appellant requests the Insurance Commissioner to order the Bureau to calculate appellant's experience modification without using JdM's past experience, arguing that appellant had no obligation to produce records to the Rating Bureau absent a warrant or administrative subpoena.[5] Appellant contends that the Bureau's request for copies of payroll records constituted a search, implicating appellant's Fourth Amendment protections. Appellant further contends that the Bureau's request for records that would show which of DeMiranda employees had worked for JdM during the 90 days immediately before the change in ownership violated appellant's due

[5] Appellant's Closing Brief at pages 5 through 10.

process rights because JdM, a third party, would presumably have ownership and control of such records.[6]

Appellant's arguments are misplaced. The Rating Bureau did not request appellant to submit records within the sole custody of a third party nor did the Bureau base its decision on its authority to inspect an insured's policy-related records. Rather, the Bureau based its decision regarding a material change in ownership on facts provided by appellant. It based its decision regarding a material change in employees or operations on appellant's failure to provide any information concerning that issue. The Insurance Commissioner need not reach appellant's constitutional arguments in order to determine whether the Bureau correctly decided that JdM's experience applies to appellant for experience rating purposes.[7]

The Rating Bureau properly based its finding that appellant's September 15, 1998, acquisition of JdM's assets constituted a material change in ownership on an abundance of evidence provided by appellant's president, Tramontin. Moreover, the fact that JdM did not purchase workers' compensation insurance after appellant's September 1998 acquisition of JdM's assets corroborates the written information Tramontin gave to the Bureau. The Bureau properly based the second part of its decision, regarding the exceptions to the change in ownership rule, viz., that the material change in ownership was not accompanied by a material

---

[6] Appellant's Closing Brief at pages 11 through 13.

[7] The ALJ notes that in addition to appellant's duty under its insurance policy to provide records to the Bureau (*ante* at p. 3), appellant has a statutory duty to provide the Bureau and the Insurance Commissioner with information affecting appellant's rates or premiums for workers' compensation insurance. (Ins. Code, § 11755). See also Experience Rating Plan section I, rule 3, requiring insurers to provide the Rating Bureau with "[a]ll information relevant to a complete analysis of a risk's ownership and/or operations to ensure the proper application of an experience modification in accordance with this Plan." Adjudication of the instant appeal, as mentioned, does not require a determination of the procedural constraints that may circumscribe the exercise or enforcement of the Bureau's or the commissioner's statutory inspection powers.

change in employees and operations, on appellant's failure to provide any evidence. The Rating Bureau's decision accords with the Experience Rating Plan's change in status rules and the burden of proof implicit in those rules.

Experience Rating Plan section IV provides in pertinent part:

> 1. Change in Status (Ownership, Operations and Employees). The following rules govern the use of past experience in future experience ratings whenever a change in ownership, management, control, operations or employees occurs. Experience of the past shall be used in future experience ratings unless a material change in ownership, as specified in paragraph a, is accompanied by a material change in operations or employees as specified in paragraph b. [Emphasis added.]
>
> a. Change in Ownership
>
> A change in ownership is material only if the owner or owners prior to the change in ownership own less than a one-half interest after the change in ownership. An ownership interest acquired by a member of the immediate family of a prior owner shall be treated the same as though the ownership interest was acquired by the prior owner.
>
> b. Change in Operations or Employees
>
> (1) A change in operations is material only if:
>
> (a) the operations (which underwent the material change in ownership) were changed, during the first ninety (90) days following the material change in ownership, to such an extent that the process and the hazard to which the employees (who conduct such operations) are exposed differ substantially from the process and the hazard to which they were exposed prior to the material change in ownership, and (b) the change in operations results in a reclassification of the operations by the Bureau.
>
> (2) Except as noted in (3) below, a change in employees is material only if:
>
> (a) a majority of the employees who conduct the operations during the first ninety (90) days following the material change in ownership were not employed to conduct such operations during the ninety (90) days immediately preceding the material change in ownership, and
>
> (b) a majority of the payroll earned by the employees who conduct the operations during the first ninety (90) days following the material change in ownership was

> earned by employees who were not employed to conduct such operations during the ninety (90) days immediately preceding the material change in ownership.

This regulatory scheme requires the Rating Bureau, absent evidence of a material change in employees or operations, to carry forward the experience of the former owner to the new owner where it finds that a material change in ownership has occurred, as defined in Experience Rating Plan section II, paragraph 4:

> Change in Ownership, for the purpose of experience rating, is defined as follows:
>
> a. All or a portion of the ownership interest in an entity is sold, transferred or conveyed from one person to another.
>
> b. An entity is dissolved or non-operative and a new entity is formed.
>
> c. Two or more corporations undergo a statutory merger or consolidation.
>
> d. All or most of the tangible or intangible assets of an entity are sold, transferred or conveyed to another entity.
>
> e. A trusteeship or receivership is set up, either voluntarily or at the direction of the courts, to operate a business.

As noted previously, appellant provided substantial and uncontroverted evidence that its acquisition of JdM's assets constituted a material change in ownership, within the meaning of Experience Rating Plan section II, paragraph 4. d.

Section 2509.61, subdivision (a), of the Insurance Commissioner's regulations governing appeals from Rating Bureau decisions allocates the burden of proof as follows: "A party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he or she is asserting." (Cal. Code Regs., tit. 10, § 2509.61, subd. (a).) The commissioner's regulation was drawn from Evidence Code section 500, which contains substantially the same language. Based on the language of Experience Rating Plan section IV,

rule 1, and the Insurance Commissioner's regulation governing the burden of proof in evidentiary hearings, the ALJ concludes as a matter of law that the burden of proof regarding the issue whether a material change in employees or operations accompanied the material change in ownership rests with appellant. In the instant appeal, appellant claims relief from operation of the Experience Rating Plan's change in ownership rule, which declares, "Experience of the past shall be used in future experience ratings . . . ." The existence of a material change in employees or operations, the exceptions to the rule, constitutes the essential element of appellant's claim for relief and therefore appellant has the burden of proving by a preponderance of the evidence that such a change occurred in the 90-day period immediately following the material change in ownership.

Allocating to appellant the burden of proving the exception to the rule requiring the use of past experience comports with fairness. Appellant had access to records or other evidence, including information that could have been provided by its employees, of a material change in employees or operations that the Rating Bureau in fact lacked. Neither the Insurance Code nor the commissioner's regulations prescribe the kind of evidence required to prove a material change in employees or operations. Generally, payroll records comprise the most reliable evidence of a material change in employees and California law requires employers to maintain such records. In the unusual case where the insured employer cannot submit payroll records to the Rating Bureau — where, for example, the records have been destroyed — the commissioner must admit and consider any relevant evidence proffered by the employer at the adjudicatory hearing, in accordance with the standard promulgated in the Administrative Procedure Act:

> Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might

make improper the admission of the evidence over objection in civil actions. (Gov. Code, § 11513, subd. (c).)

Similarly, appellant had the opportunity to submit in the first instance to the Rating Bureau any relevant information and subsequently to this tribunal any relevant evidence to demonstrate that a material change in operations accompanied the material change in ownership.

Allocating to appellant the burden of proving an exception to the Plan's change in ownership rule accords with sound policy. Placing that burden on the Rating Bureau to prove the rule's exception would impose an impossible administrative burden on the Bureau, which, as a licensed rating organization, has a statutory duty to administer and enforce the commissioner's experience rating system with respect to every workers' compensation insurance policy that provides coverage in California.[8]

Notwithstanding appellant's willful refusal to cooperate with the Rating Bureau, the evidentiary hearing before the Insurance Commissioner afforded appellant the opportunity to present evidence in support of its claim that the Rating Bureau improperly applied JdM's loss and payroll experience to appellant. The hearing notice states, "At the hearing, the parties shall have the right to present evidence in support of their respective cases and rebut evidence presented by the other parties. Evidence may include witness testimony, writings, material objects, or other things that are offered to prove the existence or nonexistence of a fact." That statement of the parties' procedural rights is consistent with the due process rights recognized in the Administrative Adjudication Bill of Rights. Government Code section 11425.10, subdivision

[8] See generally Cal. Law Revision Com. com. foll. Evid. Code, § 500, stating that considerations of fairness and public policy, including the knowledge of the parties concerning a specific fact, the availability of the evidence to the parties, and the most desirable result in the absence of proof of the particular fact, may alter even the general rule regarding the incidence of the burden of proof. Under Evidence Code section 500, the general rule applies, "[e]xcept as otherwise provided by law."

(a) (1), guarantees the parties to an administrative adjudicatory hearing the right to "notice and an opportunity to be heard, including the opportunity to present and rebut evidence. Appellant, however, called no witnesses and introduced no documentary evidence at the hearing to support its claim that loss and payroll experience developed under JdM's policy should not apply to appellant's experience rating. At the hearing, appellant declined the ALJ's offer to delay the proceedings to enable appellant to contact and produce witnesses. (Reporter's Transcript, p. 14, lines 6-21.)

As noted, appellant had the burden of proof on the issue whether a material change in employees or operations accompanied the material change in ownership. Under established evidentiary principles, appellant had the initial burden of producing evidence on that issue. (Evid. Code, §§ 110 and 550, subd. (b).)[9] Appellant produced no evidence and therefore failed to meet its initial burden. The ALJ concludes that appellant's failure to carry its burden to produce evidence and the absence any evidence in the record regarding a material change in employees or operations requires a ruling against appellant on that issue. (Evid. Code, §§ 110 and 550, subd. (a).)[10]

---

[9] Evidence Code section 110 defines "Burden of producing evidence" as "the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." Evidence Code section 550, subdivision (b), provides, "The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact." The principle articulated by section 550, subdivision (b), applies to administrative hearings. *McCoy v. Bd. of Retirement* (1986) 183 Cal. App. 3d 1044, 1051 ("As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.")

[10] Evidence Code section 550, subdivision (b), provides, "The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence."

Conclusion

The ALJ concludes that appellant DeMiranda's acquisition of the physical assets of JdM on September 15, 1998, constituted a material change in ownership as defined in Experience Rating Plan section II, paragraph 4. d., and section IV, paragraph 1. a., and that a material change in operations or employees, within the meaning of Experience Rating Plan section IV, paragraphs 1. b. (1), and 1. b. (2), respectively, did not accompany the material change in ownership. The Rating Bureau correctly determined that Experience Rating Plan section IV, paragraph 1, requires the use of JdM's loss and payroll experience in the calculation of appellant's experience modification. Accordingly, appellant's challenge to the Rating Bureau's November 16, 2000, decision is denied.

*****

I submit this proposed decision based on the hearing held before me and I recommend its adoption as the decision of the Insurance Commissioner of the State of California.

Dated: October 31, 2001

Michael Jacobs

MICHAEL D. JACOBS
Administrative Law Judge