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FILED

MAR 24 1998

ADMINISTRATIVE LAW
BUREAU

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) FILE NO. ALB-WCA-97-9
EVANS RENTS,)
)
Appellant,)
)
From a Decision of)
)
THE WORKERS' COMPENSATION)
INSURANCE RATING BUREAU)
OF CALIFORNIA,)
)
Respondent.)
_____)

PROPOSED DECISION

Evans Rents, Inc.^{1/}, dba Evans Rents Furniture, operated furniture rental showrooms in 1996, the year of the policy at issue. Evans Rents appeals to the Insurance Commissioner under Insurance Code section 11753.1 to challenge the workers'

1. This entity is now known as CORT/Evans Furniture Rental.

compensation insurance rating classification assigned to its district managers, showroom managers, and assistant showroom managers by the Zenith Insurance Company, and confirmed by the Workers' Compensation Insurance Rating Bureau (Rating Bureau).^{2/} The insurer uses the standard classification system of the Rating Bureau and has not filed for any deviation.

A live evidentiary hearing in this matter was waived in writing on December 4, 1997, by CORT Business Services Vice-President for Human Resources and Risk Management, Victoria Stiles. Ms. Stiles initiated these proceedings by appealing to the Insurance Commissioner on or about June 2, 1997. The case was assigned to Andrea L. Biren, Administrative Law Judge for the Department of Insurance on October 7, 1997. The Bates-stamped documents in the Rating Bureau file, as well as the documents supplied by CORT Business Services, its insurer, Zenith Insurance Company, and its insurance broker, Johnson & Higgins, comprise the record evidence in this matter.^{3/} The Rating Bureau,

2. The Rating Bureau is a rating organization licensed in accordance with the provisions of the California Insurance Code. (Ins. Code, div. 2, pt. 3, ch. 3, art. 3, § 11750, et seq.)

3. The Rating Bureau file documents shall be denoted as "Exh." followed by the Bates-stamp number(s). Other documents shall be denoted as "Exh." and a capital letter - these are attached to this proposed decision.

represented by E. Lynn Malchow of Frye & Malchow, filed a letter brief on January 22, 1998. No reply brief was filed by the due date of February 6, 1998. The record closed and the case was submitted for decision on February 6, 1998.

SUMMARY

This appeal concerns the classification of Evans Rents' managerial employees under the California Workers' Compensation Uniform Statistical Reporting Plan (Plan)^{4/}. The sole question presented is whether the Rating Bureau properly assigned Evans Rents' district managers, showroom managers, and assistant showroom managers to classification 8015, "Stores - Furniture - wholesale or retail."

Evans Rents contends these managerial employees should be classified as clerical office employees under Plan, Part 3, Section II, paragraph 4(a) or as outside salespersons under paragraph 4(b) because their work does not entail the risk associated with the work of other furniture store employees.

4. Evans Rents' appeal concerns its workers' compensation insurance policy effective February 1, 1996, and canceled December 31, 1996. The January 1, 1996, version of the Plan applies to the issues here presented and all references to the Plan are to that version. The Plan constitutes part of the California Insurance Commissioner's regulations, at title 10, California Code of Regulations, section 2354.

We conclude that Evans Rents' district managers, showroom managers, and assistant showroom managers are properly assigned to classification 8015, "Stores - Furniture - wholesale or retail" because of the intentionally broad nature of that classification. Evans Rents' managerial employees do not qualify as clerical office employees or outside salespersons as defined by the Plan. We affirm the insurance company's classification decision and the Rating Bureau's confirmation thereof.

FINDINGS OF FACT

During the relevant policy period, Evans Rents (the Appellant) employed district managers, showroom managers, and assistant showroom managers in two warehouses and seventeen showrooms throughout California. (Exh. 002.) The Appellant rents household and office furniture through its showrooms. District managers are retained to oversee the operations of two or more showrooms. Their responsibilities include, but are not limited to, the management of showroom personnel, outside sales personnel, sales operations for the showroom, and a variety of other customer related matters. (Exh. 28.) These employees directly supervise showroom related personnel, with personnel related activities comprising approximately 55% of their duties,

and customer relations and general management composing the residual 45%. (Exh. 001; 28.)

Additionally, showroom managers and assistant showroom managers oversee the daily operations of the seventeen showrooms in California. These employees are responsible for the appearance of the showroom, assisting customers over the phone or in the showroom, taking orders and doing other paperwork. Customer interaction on the floor of the showroom with walk-in customers takes about 12% of a typical day. (Exh. 001; 30; 29.)

Other employees move the furniture as necessary from the warehouses to customers to fulfill orders. Additionally, there are 100 employees classified as clerical/administrative (Code 8810(1)) and 10 employees classified as outside sales (Code 8742(1)). (Exh. 002.)

Initially, the workers compensation insurance policy at issue was written based on payroll estimates by classification provided by the insured and its broker. (Exh. A.) The estimates were based on placing district managers, showroom managers and assistant showroom managers in classification Codes 8810 (Clerical) and 8742 (Outside sales). (Exh. B.) On March 13, 1996, the insurance company received a Rating Bureau report based

on an August 2, 1995, inspection that assigned managers^{5/}, to classification Code 8015 (Stores-Furniture.) (Exh. A.) On May 15, 1996, the insurance company then conducted a physical checking audit of the insured's payroll. (Exhs. A & D.) On July 25, 1996, an auditor from Zenith Insurance Company informed Human Resources at Evans Rents that, among other things, this recent physical audit of Evans Rents led Zenith to the conclusion that eight district Managers needed to be reclassified from 8810 (clerical) to 8015 (Stores-furniture) and that all showroom managers and assistant managers needed to be reclassified from 8742 (outside sales) to 8015 (Stores-furniture). (Exh. D.) By the same letter, Evans Rents was informed that this reclassification would affect premium, and of its right to: request reconsideration of the decision; pursue an appeal under Insurance Code section 11734; or contact the Rating Bureau ombudsman.

On October 24, 1996, Zenith requested that the Rating Bureau visit Evans Rents showrooms for the purpose of establishing the correct classification for showroom managers and assistant

5. It is clear in the Classification Inspection Report from the August 2, 1995, inspection that district managers were not separately considered. (Exh. C.)

managers. Job descriptions were included with this request.

(Exh. 032-028.) On November 20, 1996, the Rating Bureau agreed to reinspect. (Exh. 33.) That reinspection took place on January 23, 1997, finding thirty-two employees in the manager positions. (Exhs.001-002.)

Meanwhile, CORT/Evans Rents had canceled the policy effective 12/31/96. (Exh. H.)

Also on January 23, 1997, the Rating Bureau representative met with representatives of CORT/Evans Furniture Rental, Zenith, and CORT/Evans' insurance broker to explain its classification procedure with regard to managers. Essentially, he explained that the customer assistance in a showroom takes these employees outside the classification parameters for clerical office employees or outside salespersons, and their supervisors are performe also outside those parameters. A February 5, 1997, letter from the Rating Bureau explaining the classification followed. (Exh. 35.)

On February 17, 1997, Evans Rents' broker sent Zenith its appeal of the classifications for the managers. (Exh. E.) The file also contains a June 11, 1997, letter from the broker to Zenith disputing the reclassification. (Exh. F.) This followed the June 2nd appeal to the Commissioner.

The appeal to both the insurance company and the Commissioner is based on Evans Rents' contention that:

"While all of these individuals have some responsibility for the showroom and its appearance as well as some limited contact with customers, it does not warrant a rate of \$7.16 which is the Furniture Rental Warehouse classification, 8015. Note that this classification is so broad that it encompasses the drivers and employees who move/lift furniture." (Exhs. D and G.)

Further, in an October 30, 1997 letter, Evans Rents states:

"In 1995 when the Bureau visited two other California locations, it did not include managers in the higher rate. While we agree that these jobs may not fit perfectly into the 8810 or 8742 classifications, they certainly do not fit into the 8015 classification. . . . The 8015 classification includes driving, installing furniture, lifting and moving furniture; we do have employees that do this and they are properly classified into this category. Our managers, however, do not do these things. They are responsible for the management of the districts and showrooms; this includes: supervising employees, managing expenses, computer data entry, and preparation of financial reports. We feel strongly that these duties are much more closely aligned with the class codes 8810 and 8742 than 8015."

(Exh. I.)

The insurance carrier and the Rating Bureau believe that Evans Rents was appropriately rated using the Rating Bureau classifications and regulations as interpreted by the Classification and Rating (C&R) Committee of the Rating Bureau and by the Commissioner. (Exh. G.)

The Insurance Commissioner's Regulations

The Plan contains an extensive listing of rating classifications for various occupations, employments, industries and businesses. The "single enterprise rule," contained in Plan, Part 3, Section II, paragraph 2, requires, with certain exceptions, that all operations and employees of a business be assigned to the classification which most accurately describes the entire enterprise:

"If the employer's business, conducted at one or more locations, consists of a single operation or a number of separate operations which normally prevail in the business described by a single classification, the entire exposure of the business shall be assigned to that single classification. No division of payroll shall be permitted in respect to any other operation even though such operation may be specifically described by some other classification, unless the applicable classification phraseology or other provision specifically provides for such division of payroll. Division of payroll shall be made as provided hereinafter in respect to standard exceptions and general exclusions."

Plan Part 3, Section II, paragraph 4 designates two classes of employees, outside salespersons and clerical office employees, as standard exception employees. In other words, even in a single enterprise, payroll is divided when these types of employees are present. They are separately rated. To qualify for the clerical office employee exception, an employee must meet

the requirements prescribed in paragraph 4, subdivision(a), which states:

"Clerical Office Employees are defined as those employees whose duties are confined to keeping the books, records or cash of the employer, or conducting correspondence, or who are engaged wholly in general office work or office drafting, having no regular duty of any other nature in the service of the employer. The entire payroll of any employee who is engaged in operations performed by clerical office employees and also is exposed (1) to any operative hazard of the business or (2) to any outside selling or collecting work, shall be assigned to the highest rated classification of work to which the employee is so exposed. A clerk, such as a time, stock or tally clerk, whose work is necessary, incidental or appurtenant to any operations of the business other than clerical office shall not be considered a clerical office employee. The Clerical Office Employees classification shall be applied only to the payroll of persons herein described who work exclusively in areas which are separated from all other work places of the employer by buildings, floors, partitions, railings or counters and within which no work is performed other than clerical office or drafting duties as defined in this section."

To qualify for the exception for outside salespersons, an employee's work must fit the definition found in paragraph 4 subdivision (b):

"Salespersons - Outside are defined as those employees who are engaged exclusively in sales or collection work away from the premises of the employer or who are engaged in such work for any portion of their time and devote the balance of their time in clerical office duties."

DISCUSSION

A. The Appropriate Single Enterprise Classification

Plan Part 3, Section I, sets forth the purpose of the standard classification system.

"The objective of the classification system is to group employers into classifications so that each classification reflects the risk of loss common to those employers. With few exceptions, it is the business of the employer within California that is classified, not the separate employments, occupations or operations within the business."

The classification scheme under the Plan has long been based on this policy: that the employees of a single business operation should be rated in one classification, based on the process and hazard of the business as a whole arising from all of its normal operations^{6/}, if an appropriate single business classification exists.

There are few exceptions to this policy. The only potentially relevant ones here are for those doing only clerical work and outside sales.

The amalgamated rate provides simplicity of administration, the benefits of a blended rate for all types of employees within

6. Indeed, there are general inclusions listed that are subsumed within standard classifications, which seem on their face to be unrelated, such as drivers. See Plan, Part 3, Section II, paragraph 5.

a business, and the further benefits of statewide statistical averaging, at least at the inception of a new policy without previous experience.

A blended rate provides the benefit of combining the rates of low hazard and high hazard jobs within a single enterprise. For furniture showrooms, the low hazard to showroom managers combines with the higher hazard to furniture movers to keep Classification Code 8015 at a lower rate than that of furniture movers alone. Furniture movers are rated at \$17.88 - Classification Code 8293(2) Furniture Moving. By blending the rate for all employees in furniture stores, the rate is as provided in Classification Code 8015 Stores - furniture - wholesale or retail - Rate of \$5.62.^{7/} While a blended rate may appear unfair with regard to individual employees, as demonstrated by the example, its overall effect is generally not unfair. (See In the Matter of the Appeal of Albion Grocery & Liquor, File No. ALB-WCA-93-10 (1995) (meat store blended rate includes wrappers and sawdust sweepers as well as butchers.)

Both the Rating Bureau and the Department of Insurance have closely examined the particular situation of furniture showrooms.

7. Rate quotations from the Plan effective January 1, 1995.

In 1995, the C&R Committee of the Rating Bureau reviewed the rating possibilities for furniture galleries, from which few floor sales occur. (Exh. 27-17.) This review followed a 1977 decision to maintain a single classification for both retail and wholesale furniture stores, amalgamating both inside sales employees and warehouse, delivery and miscellaneous personnel.^{8/} The 1995 review resulted in a decision to maintain the status quo. The C&R Committee rejected a classification just for galleries because they were too similar to regular furniture stores, rejected a companion classification of inside salesperson because, among other reasons, it might actually yield a higher rate than the "Stores-furniture" amalgamated rate, and rejected application of the outside sales exception to a situation in which, like other stores, sales were made to an end user (not an intermediate commercial buyer).

8. This decision was based on staff research, talks with the furniture industry, and a review of 558 inspection reports. The staff found only two states that created an "inside sales" classification for selling exclusively from samples or catalogs in a showroom. Based on the staff's survey of reports, it appeared that the amalgamation arose because it was exceedingly rare for showroom salespersons never to have occasion to pick up a lamp or other item on the showroom floor, and virtually all sold direct to consumers as opposed to buyers from other stores.

Here, the Appellant generally agrees that the single classification Code 8015 "Store-Furniture-retail or wholesale" is appropriate, but seeks exceptions for its own management employees. However, particular exceptions are not allowable; the classification scheme must apply fairly to all businesses. The Department of Insurance, in In the Matter of the Appeal of Osborne Galleries, File No. SF 6960-R-069 (1994), emphasized the importance of consistency in classifying competing businesses. Although the appellant in Osborne Galleries claimed that its interior designers moved no furniture and thus the rate for Code 8015 was too high in relation to the process and hazard connected to their jobs, the inclusion of designers within Code 8015 was upheld.

Thus, we conclude that Code 8015 "Stores-furniture-wholesale or retail" is the appropriate single enterprise classification.

B. The Standard Exceptions

Thus, since the single enterprise designation is correct, the question is whether the standard exceptions apply. Precedent indicates they do not.

Both the C&R Committee and the Commissioner have been quite strict in their interpretations of what an "outside salesperson" is. In In the Matter of the Appeal of Talbert's Contract Carpet & Tile, File No. ALB-WCA-95-13 (1996), the Commissioner held that carpet salespersons who spent 20% of their time in the showroom and 80% off the premises at customers' homes were not outside salespersons because they did not work exclusively offsite, and when onsite did not restrict themselves to strictly clerical duties.

The C&R Committee has interpreted the exception to allow a slight deviation from strictly clerical duties - selling from permanent displays to buyers for other stores (not end users) has been the only incursion of "outside sales" inside. In 1990, the C&R Committee refused to apply the classification to employees of a floor covering store who were engaged solely in showroom sales and clerical activities because they sold direct to consumers as opposed to buyers for other stores. In 1994, an employee who spent only 5-6% of his time on the sales floor was also classified as Code 8015 by the C&R Committee, not outside sales. (See Exh. 26-25.)

The Commissioner has been equally strict about extensions of the clerical operations exception. A series of decisions

regarding auto shops show this pattern. Thus, in In the Matter of the Appeal of Bob Remy Automotive, Inc., File No. SF 6960-R-036 (1993), the Commissioner considered the classification of service managers/advisors in an automobile repair shop whose function was to write up customers' service orders in an office setting. The appellant there argued that the service managers/advisors only occasionally went into the shop area, no longer road tested or inspected cars when writing the service orders and performed most of their duties within an office. The Commissioner rejected appellant's arguments and upheld the service managers' assignment to Code 8389, Automobile ... Repair Shop, rather than 8810 -- Clerical Office. The Commissioner reasoned:

"The service manager of newer automobile repair facilities probably does function differently than the 'old' type service manager who wore a shop coat, inspected cars, occasionally road-tested them, etc. prior to writing up an order. However, the current service manager still basically performs the same function; writing up customer service orders for repair work. While not necessarily exposed to the shop hazard to the same extent as the service technicians or mechanics, the service manager does not have to be. Most workers' compensation classes contemplate a certain range of hazards within the class. Some employees who are placed in a workers' compensation classification will have more exposure to the hazards of the class than others in the same class....

Code 8810, the clerical office classification, has always been limited strictly to clerical personnel....

Here, the service managers are not purely clerical personal, but in fact are a part of the shop operation, regardless of where they perform most of their duties....

Since the service manager is a part of the overall shop operations, it is not a clerical or bookkeeping function." (Bob Remy, supra, pp. 3-4.)

In In the Matter of the Appeal of Hi-Tech Collision and Painting Services, Inc., File No. SF 6960-R-034 (1994), employees were not engaged directly in automobile body repair or painting but instead greeted customers, wrote up estimates, supervised shop activities and ordered parts. In his decision, the Commissioner states:

"Here, although the major duties of the managers are of a clerical nature, they are not in any sense simply clerks or bookkeepers. They do paperwork, but it is directly connected with the body work. They are an intrical (sic) part of the basic body shop/painting operation of the Appellant." (Hi-Tech Collision and Painting Services, pp. 3-4.)

See also, In the Matter of the Appeal of Bay Transmission Company, Inc., File No. ALB-WCA-95-5 (1996) (single enterprise result.)

The same strictures apply to other types of work. In In the Matter of the Appeal of L.A. Fitness Sports Clubs, File No. ALB-WCA-94-11 (1995), the Commissioner rejected the fitness club receptionists' assignments to the standard exception for clerical

employees and upheld their assignment to the code for exercise or health institutes, stating:

"Although some individual tasks performed by the receptionists may be considered clerical in nature (taking telephone messages, for example), the great majority of their regular responsibilities -- greeting patrons, confirming membership status, making court reservations, and dispensing towels -- cannot reasonably be construed as general office work, drafting or keeping cash, books or records as specified in Rule V, subdivision 12(a). The receptionists' non-clerical responsibilities constitute an integral and necessary part of club operations. The Manual limits the clerical office employee exception to employees whose duties are clerical, '[h]aving no regular duty of any other nature in the service of the employer.'" (L.A. Fitness Sports Clubs, p. 6.)

Finally, in In the Matter of the Appeal of Sunset Haven, Inc., File No. ALB-WCA-97-3 (1997), facility administrators and directors of a nursing service were found, by virtue of their supervisory and managerial job duties, to be inappropriate for the clerical employee exclusion.

These decisions recognize that the single enterprise rule contemplates a blended rate whereby lower-risk occupations are combined with higher-risk ones within a single business operation to arrive at an average rate. The exceptions are strictly construed. These administrative precedents directly support the

classification by the insurer and the Rating Bureau's position in support of the insurer in this case.

C. Analysis of the Jobs At Issue

The job activities of district managers, showroom managers and assistant showroom managers exceed the restricted range of qualifying job activities that define the clerical office employee classification and the outside salesperson classification. Although the managers devote much of their time to office work, their overall management responsibilities, their personnel responsibilities, and their showroom interaction with customers who are not buyers from other stores regularly involve them in activities within the store facility, but outside their offices. The evidence indicates that all types of managers, including district managers, spend some amount of time in the showrooms. The main job of district managers is personnel-related, not sales related. There is no evidence to indicate that their sales, or the sales of their subordinates, are solely to buyers from other stores. Thus, under the strict construction of the outside salesperson exception, these managers are not classifiable as outside salespersons.

Moreover, they are not segregated, as clericals subject to the exception must be. Supervisory work cannot be characterized as clerical or general office work - it is "necessary, incidental or appurtenant to operations of the business other than the clerical office." (Part 3, Section II, paragraph 4(a).) Finally, all these managers spend much of their time in the facilities of the company doing work other than clerical work.

Accordingly, these managers do not do work that falls within either standard exception.

DETERMINATION OF ISSUES

Evans Rents's district managers, showroom managers and assistant showroom managers engage in job activities that exceed those allowed for clerical office employee classification or the outside sales classification under Plan Part 3, Section II, paragraph 4(a) and (b). Therefore, the payroll for these managerial employees is not subject to division under Plan Part 3, Section II, paragraph 2, the single enterprise rule. In accordance with the Plan's single enterprise rule, the Rating Bureau properly assigned these employees to Plan code 8015, "Stores - Furniture - wholesale and retail."

ORDER

The decision of the Insurer and the position of the Workers' Compensation Insurance Rating Bureau are affirmed.

I submit this proposed decision on the basis of the evidence before me and I recommend its adoption as the decision of the Insurance Commissioner of the State of California

DATED: February 27, 1998



ANDREA L. BIREN
Administrative Law Judge
Department of Insurance