DEPARTMENT OF INSURANCE
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FILED
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ADMINISTRATIVE LAW BUREAU

**BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of FALLBROOK GLASS, INC. Appellant, From a Decision of THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA, Respondent.	FILE NO. ALB-WCA-95-1

PROPOSED DECISION

This matter was heard before Administrative Law Judge Janice E. Kerr in Los Angeles on January 30, 1996.

Appellant, Fallbrook Glass, Inc. ("Fallbrook"), was represented by Gary S. Press, President, 616 E. Alvarado Street, Suite A, Fallbrook, California.

Respondent, Workers' Compensation Insurance Rating Bureau ("Bureau"), was represented by John N. Frye, Esquire, of the law firm of Frye & Alberts, 1901 Avenue of the Stars, Suite 390, Los Angeles, California, Warren J. Clark, Vice President of the

Bureau, and Peter E. Murray, Senior Vice President, Spear Street Tower, Suite 50, One Market Plaza, San Francisco, California.

The basic facts in this matter are not in dispute. Fallbrook sells and installs plate glass, mirrors and pre-glazed doors and windows. Glass and mirror stock are cut, ground and prepared for installation in the shop. An outside crew installs metal-framed glass in industrial buildings, pre-glazed aluminum framed windows and doors in commercial buildings and mirrors in residential homes. The classification at issue here is Code 5462 - "Glaziers - away from shop."[1]

During the 1991/92 policy period, due to a slowdown in construction, an employee who had previously performed only clerical and outside sales/estimating duties, was asked to assist employees in the shop and do glazing in the field. He performed these duties during the months of February, March and April 1991 and again in November and December, 1991. Thereafter, the employee was engaged in shop and field activities on a regular basis.

Following an audit of the 1991 policy, the entire payroll of the employee was assigned to the highest rated classification

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[1] The other classifications assigned to Fallbrook's operations are: Code 4130 - "Glass Merchants; Code 5146, "Cabinet or fixtures - portable interior trim - installation;" and Code 5102(2), "Door, Door Frame or Sash Erection."

(Code 5462) pursuant to Rules V and VII of the Workers' Compensation Insurance Manual.[2]

Fallbrook then filed a complaint in small claims court against its insurance carrier, California Compensation Insurance Company ("Cal Comp"), for the claimed increase in premium due to the higher classification, $2,771. Judgment was awarded to Fallbrook on October 13, 1993. Cal Comp appealed, however, and on February 4, 1994, the judgment was reversed. (Docs. 51-55)

In support of its appeal, Cal Comp submitted a letter signed by Paul H. Brundage, Manager of the Classification and Audit Review Department of the Bureau. The letter explains the Bureau's appeal process and sets forth the applicable rules and rating system. It concludes that, since Fallbrook's employee "was not engaged exclusively in outside sales functions as defined in the above quoted rule, no portion of his payroll may be assigned to Code 8742." (Docs. 57). In granting Cal Comp's appeal, the Superior Court found that it lacked jurisdiction to hear the matter which should be before the "Workmen's Compensation Appeals Board."[3] (Docs. 55)

Fallbrook's Mr. Press then filed a complaint with the Bureau on February 23, 1993 and an inspection was performed by the Bureau on May 17. After the Bureau advised Fallbrook's carrier,

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[2] "Manual of Rules, Classification and Basic Rates for Workers' Compensation Insurance." The Manual contains rules promulgated by the Insurance Commissioner which are to be applied by the Bureau.

[3] It appears the Court misspoke its intention to refer to the Bureau.

Cal Comp, that the employee at issue should remain assigned to Code 5462, "Glaziers - away from shop" not Code 8742(1) "Salespersons - outside," Fallbrook appealed to the C & R.

Fallbrook's Mr. Press told the C & R that his insurance agent had advised him that the employees payroll could be segregated between outside sales/clerical office work, shop work and construction work. He also presented a memorandum prepared by a Cal Comp auditor which confirmed that an insurance agent with Rubin Insurance Agency had advised the insured that the employee's payroll could be divided (Docs. 14).

Mr. Press stated that the billing statements received from Fallbrook's agent indicated that the agent had paid the premium difference due to the classification discrepancy for the 1991 policy. Believing the classification discrepancy to have been resolved, Fallbrook's payment of its 1992 policy premium reflects the less expensive classification. It then learned that the underlying dispute had not be resolved.

Mr. Press also advised the C & R that he now understands the requirements of the Manual. At the time, however, he had relied as a reasonable businessperson on the advice of his "insurance representative ."

The C & R noted that its "charge" is to determine whether the insurer and the Bureau correctly applied the Manual rules and, accordingly, by letter dated December 29, advised Fallbrook that the correct Code had been applied.

On January 5, 1995, Fallbrook appealed to the Commissioner and this hearing followed.[4] At the hearing Mr. Press reiterated that he now understands how the manual should be applied, but he does not believe he should be penalized for having relied in good faith on the information provided by his agent. He also stated that one of the C & R members suggested that the C & R believes Fallbrook has a "valid claim" but the Rating Bureau cannot take it into consideration. Further, he was advised by the C & R member that Fallbrook should appeal to "this Court" because it "can take these types of things into account." (TR. 14)

Fallbrook's Position

As clarified at the hearing, Fallbrook understands that the Manual requires an employee who is not engaged exclusively in outside sales to be assigned to the higher rated classification for glaziers (Code 5462), even though Fallbrook's agent had advised that time segregated for sales could be assigned the lower rating. However, Fallbrook does not believe it should pay the difference in rates between the two classifications because it relied on its broker's advice and set up its business accordingly.

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[4] The appeal was filed pursuant to California Insurance Code Section 11753.1 which provides that a person aggrieved by a decision, action or omission to act of a rating organization may file a written complaint and request a hearing with the Insurance Commissioner.

Bureau's Position

The Bureau is sympathetic to Fallbrook's plight but believes that the C & R's authority is limited to ensuring that the Manual rules are applied; it cannot resolve disputes between a broker or agent and appellant.

Discussion

The record clearly indicates that Fallbrook's employee did not devote 100% of his time to clerical/sales duties. Because he assisted in both the shop and the field, he must be assigned to the higher rated classification, Code 5462.

However, it is also clear that Fallbrook relied on the consistent advice of its insurance agent, Alan George, with Rubin Insurance Agency, that the employee could be assigned to two different classifications if adequate records were kept. George was not only consistent; he was adamant in his opinion.

Once it became clear that its insurer, Cal Comp, was going to insist on the higher classification, Fallbrook took appropriate action. It filed a complaint in Small Claims Court. No doubt due to unfamiliarity with legal procedures, however, Fallbrook named only Cal Comp as a defendant and failed to name Alan George and Rubin Insurance Agency.

The waters were further muddied by Cal Comp's characterization of the dispute as only a rating issue, rather than a good faith reliance issue as well, in appealing the Small Claims Court Order. In furtherance of this strategy Cal Comp

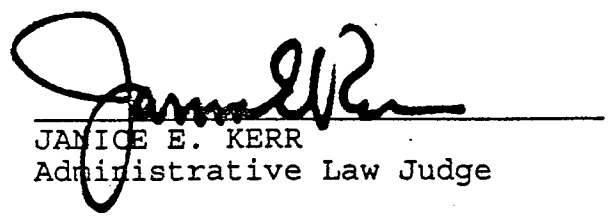
introduced the letter signed by the Bureau's Mr. Brundage which clearly states that the higher classification for glaziers should be used. While Cal Comp's efforts to characterize the dispute as a rating issue is understandable because it claims not to have given Fallbrook any misleading advice, it is unfortunate that this matter could not have been settled along the way rather than requiring Fallbrook to visit a myriad of forums.

In any event, since it is clear that, pursuant to the Manual rules, the correct classification to be assigned to Fallbrook's employee is Code 5462, given the facts presented here, the Commissioner cannot require that a different Code be assigned. The appropriate avenue for any relief would be for Fallbrook to file again in Small Claims Court this time naming at the least the insurance agency and agent.

ORDER

Therefore, IT IS ORDERED that Code 5462 should be assigned to Fallbrook's employee. The Bureaus' December 12, 1994 decision regarding Fallbrook is sustained. This decision and order is effective in 20 days.

DATED: March 6, 1996



JANICE E. KERR
Administrative Law Judge