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BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	
GOLDBERG & SOLOVY FOODS, INC.,	)	
	)	
Appellant,	)	FILE AHB-WCA-09-01
	)	
From the Decision of the	)	
	)	
WORKERS' COMPENSATION INSURANCE RATING BUREAU,	)	
	)	
Respondent.	)	
	)	

PROPOSED DECISION

I. Introduction

Goldberg & Solovy Foods, Inc. ("G&S" or "Appellant") brings this appeal under California Insurance Code section 11737(f),[1] disputing the December 1, 2008 decision of the Workers' Compensation Insurance Rating Bureau ("WCIRB" or "Respondent"),[2] to

[1] Section 11737(f) provides in pertinent part: "Every insurer or rating organization shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard by the insurer or rating organization on written request to review the manner in which the rating system has been applied in connection with the insurance offered or afforded. . . . Any party affected by the action of the insurer or rating organization on the request may appeal, within 30 days after written notice of the action, to the commissioner . . . ."

[2] The WCIRB is a rating organization licensed by the Insurance Commissioner under Insurance Code section 11750, et seq., to assist the Commissioner in the development and administration of worker's

assign classification code 8021, *Stores—meat, fish or poultry—wholesale*, to Appellant's operations. Appellant requests that classification code 8018, *Stores—wholesale—N.O.C.*, be assigned to its operations. The policy involved is Appellant's 2007 worker's compensation insurance policy with Zurich American Insurance Company ("Zurich").[3]

For the reasons set forth below, the WCIRB's decision to assign classification code 8021, *Stores—meat, fish or poultry—wholesale*, to Appellant's operations is affirmed.

II. Issue Statement

Pursuant to the California Code of Regulations, title 10, section 2318.6, and the Standard Classification System, Part 3, of the California Workers' Compensation Uniform Statistical Reporting Plan[4] ("USRP"), did the WCIRB properly assign Appellant's operations to classification code 8021, *Stores—meat, fish or poultry—wholesale*?"

III. Contentions of the Parties

Appellant disputes the WCIRB's assignment of its operations to classification code 8021, *Stores—meat, fish or poultry—wholesale*. Instead, Appellant contends that its operations should be assigned to classification 8018, *Stores—wholesale—N.O.C.*, arguing that its gross receipts from its prepackaged meat, fish and poultry should be assigned to

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compensation insurance classification and rating systems. The WCIRB serves as the Commissioner's designated statistical agent for the purpose of gathering and compiling experience data developed under California worker's compensation and employers' liability insurance policies. (Ins. Code § 11751.5.)

[3] The workers' compensation insurance policy number was WC-5086971. It incepted on August 21, 2007 and was in effect through August 21, 2008.

[4] The California Workers' Compensation Uniform Statistical Reporting Plan—1995, 10 Cal. Code Regs. § 2318.6, is approved by the Commissioner under a grant of legislative authority. (Ins. Code, §11734(c).) The USRP itself acknowledges this and provides that the "Plan contains the necessary rules...for the filing of policy documents and reporting of experience in connection therewith...." USRP, Part 1, Section I, Rules 1 & 2. The appeal in this matter arises under Appellant's 2007 workers' compensation insurance policy and as a result, the 2007 edition of the USRP applies to this proceeding.

classification 8018, along with the gross receipts for its dry goods and condiments. Appellant further argues that the gross receipts from its processed meat, fish and poultry is less than 25% and should be assigned to classification code 8018.[5]

The WCIRB argues that pursuant to the rules set forth in the Standard Classification System of the USRP's Special Industry Classification Procedures, Appellant's overall operation, including the prepackaged meat, fish and poultry portion of its operation, is a wholesale meat store, requiring that all operations and occupations that normally prevail within that business be assigned to the wholesale meat store classification 8021, *Stores—meat, fish or poultry—wholesale*.[6] The WCIRB bases its argument on its assertions that: 1) Appellant's gross receipts from meat, fish and poultry sales exceed 25%; and 2) the processing of <u>any</u> meat, fish and poultry requires Appellant's entire operation to be assigned to classification 8021, *Stores—meat, fish or poultry—wholesale*.

IV. Procedural History

G&S filed its appeal in this proceeding on January 5, 2009. The Appeal Inception Notice was issued on February 20, 2009. A request for an Order Extending Time from the WCIRB was granted to allow the WCIRB to perform an inspection of Appellant's operations. The WCIRB filed its response to the appeal on May 8, 2009. Status conferences were held and an evidentiary hearing was set.

Administrative Law Judge ("ALJ") Lisa A. Williams conducted the evidentiary hearing on August 18, 2009, in Los Angeles, California. All parties were provided the opportunity to file pre-hearing briefs and introduce documentary and testimonial

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[5] Appeal, p. 2; Appellant's Pre-hearing Brief, p. 2.
[6] WCIRB Pre-hearing Brief, p. 5.

evidence. Appellant and the WCIRB filed witness lists and pre-hearing briefs, and lodged exhibits. All exhibits were admitted into evidence except Appellant's Exhibit 5.[7] Appellant also submitted its Exhibit 6 at the hearing, which was admitted.

Guido Dito, Jr., of Dito and Mera Inc., dba D&M Risk Management Services, appeared as a non-attorney representative on behalf of Appellant G&S. Ed Gavidia, Owner of G&S, was also present but did not testify.

John N. Frye, Esq., and the WCIRB Managing Attorney Reggie Griner, Esq., appeared on behalf of the WCIRB. Brian Gray, Quality Assurance Director in the WCIRB's Classification and Test Audit Division, appeared and testified on behalf of the WCIRB.

Appellant's workers' compensation insurance carrier, Zurich American Insurance Company, did not participate in the evidentiary hearing.

All witnesses were duly sworn, examined and cross-examined by the parties and the ALJ. The ALJ closed the record by order dated September 21, 2009.

V. Findings of Facts

The ALJ finds by a preponderance of the evidence the following facts:

Appellant's Operations

G&S is a wholesale distributor located in Vernon, California. Appellant sells various dry goods, condiments, and fresh and frozen meat, fish and poultry.[8] Some, but not all, of the meat, fish and poultry sold was prepackaged. Appellant's operations provide food supplies to commercial businesses such as restaurants and institutional

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[7] The WCIRB objected to Appellant's Exhibit 5, which was not admitted because it was a prior non-precedential Administrative Bureau Hearing decision.

[8] The term "meats" includes meat, fish and poultry, and is used herein interchangeably.

facilities.[9] No sales are made to the general public. G&S processes some of its meat, fish, and poultry before it sells them to its customers.

Although there are a variety of separate work and storage areas in Appellant's facility,[10] the entire operation is a single store that is serviced by a "common shipping and receiving area where the various types of merchandise are received, staged and transferred to the appropriate storage areas within the facility."[11]

Dry Goods and Condiments

Appellant wholesales a variety of dry goods and condiments such as paper goods, dry food stuffs, flour, breading, juices, cheeses, gelatin, cooking oil, pasta, prepackaged vegetables, and shortening.[12] The goods are received and inventoried, then placed in storage until pulled to fill orders. Once an order is received, the items are removed from storage, placed in boxes, and loaded on carriers for delivery to the customer.[13] Appellant generates 71% of its gross receipts from its dry goods sales.[14]

Meat, Fish and Poultry

Prepackaged, Box-In/Box-Out

G&S receives fresh and frozen meat, fish and poultry from various vendors.[15] Some of these items arrive at Appellant's facility pre-packaged and are placed in a cold storage area or a freezer. Once a customer places an order, the meat, fish or poultry is shipped to the customer in its original containers without G&S opening the original

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[9] Exhibit ("Exh.") 203; Hearing Transcript ("HT"), 45:19-46:10.
[10] For example, there are various meat, fish and poultry processing areas, as well as freezers and cold storage rooms (Exh. 202).
[11] HT, 30:15-31:15, 45:14-23.
[12] Exh. 202.
[13] Exh. 202.
[14] Exh. 202; HT, 26:12-21, 35:5-6.
[15] Exhs. 6, 200, 201 and 202.

package or making any changes to it.[16] These are commonly referred to as "box-in, box-out" meats, and are considered non-processed in the meat industry. Appellant generates 16% of its gross receipts from its non-processed meat, fish and poultry sales.[17]

Processed Meat, Fish and Poultry

Appellant processes meat, fish and poultry from a variety of sources. Some of the meat, fish and poultry to be processed come pre-boxed while others are fresh or previously frozen. The meat, fish and poultry to be processed is taken to specific processing areas where trimming, cutting, de-boning and grinding is performed. The processed meat, fish and poultry is then returned to storage until it is shipped to fill customer orders.[18] Appellant generates 13% of its gross receipts from its processed meat, fish and poultry sales.[19]

There is no formal definition of the term "processing" in the USRP. Case law requires that where there is no specific definition provided by regulation or statute, the word be accorded its ordinary and natural meaning.[20] In Merriam Webster's Tenth Collegiate Dictionary (1993) page 929, processing is defined in part as: "a series of actions or operations conducting to an end; *esp*: a continuous operation or treatment esp. in manufacture." The WCIRB generally defines processing as "... the act of handling meat in an unpackaged form," and can include simple re-packaging as well as cutting, de-boning, portioning, trimming, and grinding.[21] During the evidentiary hearing the parties discussed various types of meat processing that generally occurs in the meat industry, and

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[16] Exh. 202; HT, 39:11-40:9.
[17] Exh. 202; HT, 35:6-7.
[18] HT, 27:18-40:9.
[19] Exh. 202; HT, 35:7-8.
[20] *Director, Office of Workers' Compensation Programs, Department of Labor, Petitioner* v. *Greenwich Collieries Director, Office of Workers' Compensation Programs, Department of Labor, Petitioner* v. *Maher Terminals, Inc. et al.* (1994) 512 U.S. 267, 274-276, 114 S. Ct. 2251, 2256-2257.
[21] HT, 65:2-68:13.

the ALJ finds that the WCIRB's definition is acceptable for the purposes of classification assignments in the meat processing industry.

WCIRB Inspections

The WCIRB performed the following inspections of G&S's operations.

1. October 17, 2003 Inspection

On October 17, 2003, the WCIRB performed an inspection of Appellant's operations and facility. The inspector assigned classification codes 8018, *Stores—wholesale—N.O.C.*, and 8021, *Stores—meat, fish or poultry—wholesale*, to Appellant's operations.[22] Upon reflection, the WCIRB subsequently recanted this finding during the evidentiary hearing and concluded that only classification code 8021 should have been assigned.

2. October 15, 2005 Inspection

On October 15, 2005, the WCIRB performed an inspection of Appellant's operations and facility. In the inspection report, the WCIRB inspector described Appellant's operations as having 80% non-processed products and 20% processed meats, and assigned Appellant's overall operations to classification code 8018, *Stores—wholesale—N.O.C.*[23] During the evidentiary hearing, the WCIRB again recanted this finding and concluded that only classification code 8021 should have been assigned.

3. March 4, 2008 Inspection

On March 4, 2008, the WCIRB performed an inspection of Appellant's operations and facility. In the inspection report, the WCIRB described Appellant as selling 71% non-meat products, 16% non-processed meats, fish and poultry, and13% processed

[22] Exh. 6; HT, 59:6-61:4.
[23] Exh. 200; HT, 63:4-23.

meats, fish and poultry. The combined gross receipts from Appellant's meat, fish and poultry sales equaled 29%.[24] Appellant's overall operations were assigned to classification code 8021, *Stores—meat, fish or poultry—wholesale.*[25]

4. April 16, 2009 Special Inspection

On April 16, 2009, the WCIRB performed a special inspection of Appellant's operations and facility.[26] The WCIRB found that Appellant sold 71% non-meat products. The meat, fish and poultry products sold consisted of 16% non-processed meat, fish and poultry, and 13% processed meat, fish and poultry, for a combined total of 29% meat sales. Appellant's overall operations were again assigned to classification code 8021, *Stores—meat, fish or poultry—wholesale.*[27]

DISCUSSION

VI. Applicable Law and Analysis

The Regulatory Scheme

The provisions of the USRP constitute part of the Insurance Commissioner's regulations.[28] All California businesses are classified using the Standard Classification System under Part 3 of the USRP. The USRP contains an extensive listing of rating classifications for various occupations, employments, industries, and businesses.[29] As

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[24] Exh. 201.
[25] Exh. 201.
[26] The WCIRB performs a special inspection when requested to do so by an interested party, most frequently the workers' compensation insurance carrier, where there is a classification dispute involved. Exh. 202.
[27] Exh. 202.
[28] Cal. Code of Regs., tit. 10, § 2318.6.
[29] USRP, Part 1, Section I.

part of the California Code of Regulations, the rules have the force and effect of statutes.[30]

The USRP sets forth its objective as follows:

> 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*.[31] (Emphasis added.)

Thus, each classification reflects the type of operations common to that group of employers. The WCIRB calculates recommended rates per $100 of payroll for each classification based on payroll and loss data reported to the WCIRB by all workers' compensation insurance carriers pursuant to the rules of the USRP. For most businesses, classifications are assigned under the USRP's Single Enterprise Rule by analyzing an employer's overall California operations and identifying one classification that describes the business as a whole.

This approach is based on the premise that employers within a specific industry generally operate in a similar manner and engage in comparable processes. Thus, the resulting classification rate reflects the average anticipated cost of medical and indemnity benefits, per $100 of payroll, incurred by businesses within a particular industry. This approach also is relatively simple for the WCIRB to administer in that most employers use only one classification. Furthermore, the Single Enterprise Rule analysis promotes the gathering of accurate payroll and loss data that enables the WCIRB and insurers to develop rates specific to a particular industry.

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[30] Cal. Code of Regs., tit. 10, § 2350; *Yamaha Corp.* v. *State Bd. Of Equalization* (1998) 19 Cal.4th 1, 10.
[31] USRP, Part 3, Section I.

A. The Single Enterprise Rule Applies to Appellant's Operations

The Single Enterprise Rule provides, in part:

> *If the employer's business, conducted at one or more locations, consists of a single operation or a number of separate operations that normally prevail in the business described by a single classification,* the entire exposure of the business shall be assigned to that single classification.[32] (Emphasis added.)
>
> 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 provisions contained herein specifically provide for such division of payroll.

Appellant's sole operation is a wholesale store that sells merchandise to restaurants and commercial institutions. No sales are made to the general public. All operations are serviced by a common shipping and receiving area where the various types of merchandise are received and transferred to the appropriate storage areas within the facility. The meat, fish and poultry are either stored as is, or are processed and then stored. As a single enterprise, it is necessary to assign Appellant's operations to a single classification that best describes Appellant's business.

B. Special Industry Classification Procedures Apply to G&S

The Standard Classification System of the USRP contains Special Industry Classification Procedures, and among them is "Stores." Under the USRP's Special Industry Classification Procedures, store operations are determined separately for each type of store that is conducted as a separate operation without any interchange of labor.[33]

The definition of wholesale stores applicable to Appellant is: "... the selling of merchandise to the following: (c) industrial, agricultural, commercial, governmental,

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[32] USRP, Part 3, Section III, Rule 2.
[33] USRP, Part 3, Section IV, Rule 5(a).

institutional, or professional users."[34] This definition applies to G&S because Appellant wholesales dry goods, condiments and meat, fish and poultry to restaurants and other commercial institutional facilities.

C. Appellant's Wholesale Operations are Correctly Assigned to 8021

Appellant's wholesale operations are correctly assigned to classification code 8021, *Stores—meat, fish or poultry—wholesale*, for two reasons: 1) classification code 8021 accurately describes Appellant's operations, and 2) Rule 5 (b)(1) of the USRP or the "25% Rule," requires Appellant's operations be assigned to classification code 8021.

1) Classification Code 8021 Applies to Appellant

Appellant's operations are specifically described in classification code 8021: "STORES—meat, fish or poultry—wholesale."

Moreover, the footnote to classification code 8021 states:

> Wholesale stores that confine the operations to the receiving, shipping or repackaging of prepackaged meat, fish or poultry shall qualify for the assignment of Classification 8018, *Stores — wholesale.* When a wholesale meat, fish or poultry store cuts, trims, debones or otherwise processes any meat, fish or poultry, all operations shall be classified as 8021, *Stores — meat, fish or poultry — wholesale.*[35] (Emphasis added.)

The USRP also states that:

> The applicable store classification is determined based upon the type of merchandise sold and whether the operations are wholesale or retail. *In the absence of specific instructions found in the* classification phraseology or *footnote*, the following definitions apply when determining the applicable store classification.[36] (Emphasis added.)

The footnote to classification code 8021 applies to and governs Appellant's operations. In accordance with the rules in the USRP, "Footnotes are

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[34] USRP, Part 3, Section IV, Rule 5(b)(1).
[35] USRP, Part 3, Section VII, pp. 136-137. (Italics in USRP).
[36] USRP, Part 3, Section IV, Rule 5(b).

in regular type and are located after the classification code number. *Footnotes give directives regarding the application of the classification* or indicate activities that are subject to separate classifications."[37] (Emphasis added.)

The footnote to classification code 8021 specifically states that if <u>any</u> meat, fish or poultry <u>is processed, all of the operations of the wholesale store shall be classified as 8021</u>, *Stores — meat, fish or poultry — wholesale.* In addition, the USRP defines the word "all" in classification terminology, in part as follows:

> If a classification carries a descriptive phrase beginning with *all*, as in the expression *all employees, all other employees, all operations, and all work to completion*, a division of payroll shall not be made for any employee or operations ..., without regard to the location of such operations....[38]

The footnote to classification 8021 does not distinguish between the percentages of the wholesaler's gross sales involved in processing meats. It explicitly uses the word "any," thus indicating that it applies to even the smallest amount of meat processing. Therefore, pursuant to the mandatory language of this footnote, and the definition of the word "all," Appellant's operations must be assigned to classification code 8021, *Stores — meat, fish or poultry — wholesale,* because it cuts, trims, debones and otherwise processes some of the meats, fish or poultry that it sells.

2) <u>Rule 5 (b)(1) or the 25% Rule</u>

The USRP's Special Industry Classification Procedures for stores mandates that:

> If a store sells more than one type of merchandise, each of which may be subject to a different classification, the store classification shall be determined *based on the highest rated category of*

[37] USRP, Part 3, Section VII, Rule (1)(c).
[38] USRP, Part 3, Section II, Rule 1. (Italics in USRP).

merchandise sold, provided that category exceeds twenty-five percent (25%) of gross receipts. (Emphasis added.)[39]

Appellant is correctly assigned to classification code 8021 because its sells 16% non-processed meat, fish and poultry, and 13% processed meat, fish and poultry, for a combined total of 29% in sales receipts. The rule does not distinguish between processed and non-processed meats. Appellant's total meat, fish and poultry sales of 29% exceed the 25% limit. Thus, under the USRP's Rule 5 (b)(1), or the 25% Rule, Appellant's operations must be assigned to the highest rated category[40] of merchandise sold, classification code 8021, "*Stores — meat, fish or poultry — wholesale.*"

D. Classification Code 8018 Does Not Apply to Appellant's Operations

Appellant requests that the dry goods, condiments, and pre-packaged box-in, box-out meat, fish and poultry portions of its operations be assigned to classification code 8018, the lower rated category, because that portion of its operations is comprised of non-processed meats. Classification code 8018 is described as: "STORES—wholesale—N.O.C." The "N.O.C." designation is defined as follows:

> This expression is an abbreviation of not otherwise classified. No classification so qualified shall be assigned in any case *where another classification more accurately describes the enterprise or where the language of any classification so qualified prescribes other treatment.*[41] (Emphasis added.)

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[39] USRP, Part 3, Section IV, Rule 5 (b)(1).

[40] The pure premium rate for Classification Code 8021 is $7.23, compared to Classification Code 8018, which has a pure premium rate of $4.61, for every $100.00 of payroll. (USRP, Appendix I, Pure Premium Rate Section, Codes 8021 and 8018, p. 200.)

[41] USRP, Part 3, Section II, Rule 17.

The language of the footnote to classification code 8021 prescribes the treatment to be applied to Appellant's operations because Appellant does do some processing of meat, fish and poultry. Appellant argues that classification 8021, *Stores—meat, fish or poultry—wholesale*, should only be assigned to the gross receipts from its processed meats, fish and poultry, and that conversely, the gross receipts for its non-processed meat, fish and poultry, and its dry-good and condiment operations should be assigned to classification 8018, *Stores—wholesale—N.O.C.* The WCIRB argues to the contrary that Appellant's argument is incorrect because the footnote to 8021 precludes the application of classification 8018 to any wholesale store that processes any meat, fish or poultry.[42] Moreover, since 29% of the sales from Appellant's operations are from processed meats, Appellant does not qualify for the exception under 8021; and, the 25% Rule precludes assignment of classification code 8018.

Appellant may feel that the rate for classification 8021 does not reflect the overall risk to its operations. However, as correctly noted by the WCIRB,[43] the pure premium rate for classification 8021 is based on the aggregate payroll and loss data from the industry. As such, the pure premium rate for classification 8021 incorporates all of the exposures to hazard, both greater and lesser, that are inherent to the wholesale stores industry that include meat, fish and poultry processing.[44]

Furthermore, the Insurance Commissioner, sitting in his quasi-judicial capacity, must apply the rules of the USRP as they exist and cannot change them to accomplish a purpose that does not appear on the face of the regulations: "[t]he Rating Bureau and the Insurance Commissioner, acting in a quasi-judicial capacity, are bound by the clear terms

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[42] WCIRB Pre-hearing Brief, pp. 3-10.
[43] WCIRB Pre-hearing Brief, pp. 5, 10.
[44] USRP, Part 3, Section III, Rule 2.

of the Rating Plan and may not add to or alter those terms to accomplish a purpose that does not appear on the face of the regulations."[45] Because the Commissioner's rules have been promulgated by the Insurance Commissioner under a grant of legislative authority after formal public hearings, they cannot be rewritten or revised by the Commissioner sitting in his adjudicatory capacity. The WCIRB has annual public hearings regarding amendments to the USRP that Appellant may attend.

VII. Conclusion

The ALJ finds that classification code 8021 applies to Appellant's 2007 workers' compensation insurance policy year operations because: 1) classification code 8021 accurately describes Appellant's operations and its footnote requires Appellant's operations be assigned to classification code 8021; and, 2) the USRP's Rule 5 (b)(1) or the 25% Rule, requires Appellant's operations be assigned to classification code 8021.

Pursuant to California Code of Regulations, title 10, section 2509.61, subdivision (a), "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."

Based on the evidence submitted by the parties, the record on appeal, and the foregoing analysis of the facts and law at issue, Appellant has failed to meet its burden of proof to show that its operations should be assigned to classification code 8018, "Stores—wholesale—N.O.C."

The WCIRB has met its burden of proof to show that Appellant's operations should be assigned to classification code 8021, "*Stores — meat, fish or poultry — wholesale.*"

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[45] *In the Matter of the Appeal of California Restaurant Ventures, Inc.*, File No. ALB-WCA-00-36, CDI Precedential Decision effective 1/21/2002, pp. 8-9.

* * * *

ORDER

The decision of the Workers' Compensation Insurance Rating Bureau to assign Appellant Goldberg & Solovy Foods, Inc.'s 2007 policy year operations to classification code 8021, "*Stores — meat, fish or poultry — wholesale,*" is affirmed.

I submit this proposed decision based on the evidentiary hearing, records and files in this matter, and recommend its adoption as the decision of the Insurance Commissioner of the State of California.

Dated: October 12, 2009

LISA A. WILLIAMS
Administrative Law Judge
Administrative Hearing Bureau
California Department of Insurance