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BEFORE THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of KEVIN D. WOODY LANDSCAPE MAINTENANCE, INC. Appellant, From a Decision of THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA, Respondent.	FILE NO. ALB-WCA-95-11

PROPOSED DECISION

Appellant Kevin D. Woody Landscape Maintenance Inc. ("Woody Landscape") appeals the decision of the Classification and Rating Committee of Respondent Workers' Compensation Insurance Rating Bureau of California ("Bureau")[1] ~~affirming the imposition of: a~~

[1]The Bureau is a licensed rating organization within the meaning of Insurance Code section 11750.1 and serves as the Insurance Commissioner's designated statistical agent under

DISCUSSION

The various parts of an enactment must be harmonized by considering a section in the context of the framework as a whole. (Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 795, 799.) It is true that there is nothing in the regulations

requiring experience modifications to be issued in a time certain and the language of some regulations strongly implies an expectation that sometimes experience modifications are delayed. By the same token, the regulations also evince an intent to ensure that the employer has notice of experience modifications. See, e.g., Manual Rule VII, paragraph 10. In harmonizing these elements of the regulatory scheme, it has already been determined administratively that only reasonable delay necessary to gain reliable information sufficient to allow the objective capability of calculation will be countenanced. (Gold Coast Harvesting, Inc., File No. ALB-WCA 94-1 at p.19.)

The question presented then, is whether the delay herein was reasonable because of insufficient information, lack of policies or the Appellant's status as one who has attempted to evade experience modifications under Rule I, Section (6) of the Plan.

A. The Delay After October 1993 Was Not Justified By Insufficient Information or Lack of Policies

Experience modifications are calculated using payroll and claims loss information from preceding years. To calculate the most accurate modification, the Bureau needed this information for the period from May 1989 to June 1992 during which Appellant leased its employees but maintained control over them. By

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A. The Delay After October 1993 Was Not Justified By Insufficient Information or Lack of Policies

Experience modifications are calculated using payroll and claims loss information from preceding years. To calculate the most accurate modification, the Bureau needed this information for the period from May 1989 to June 1992 during which Appellant leased its employees but maintained control over them. By

October 1993, at the latest, the Bureau was aware that the Contractors Resource carriers had no more information. There was other information available concerning the employee leasing period, but it was in Appellant's possession. The Bureau did not ask Appellant for this information directly or indirectly.[13] Until October 1993, the Bureau had good cause on the basis of insufficient information to delay the publication of the experience modifications for 1992, 1993, and 1994.

We reject the Bureau's argument that it also had good cause to delay because there were no policies to which to apply experience modifications. The Bureau knew as of October 1993 as well that other than the October '89 to July '90 and December '90 to December '91 policy, no other separate policies would be written. In the ordinary course of events, the Bureau regularly issues experience modifications in advance of the policies to which they will apply, without knowing whether those policies

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[13]The Bureau asserts it did not ask Woody Landscape for the information because: 1)it deals with carriers, 2)it would be unreliable and 3)it would be burdensome. Although it would not have made a difference in the delay in this case because of the gap in Woody Landscape's records too, the reasons for not asking are rejected. The Bureau <u>was</u> dealing with Woody Landscape anyway; the carriers' records were unreliable and the insured's nonexistant, so Woody Landscape's could not be worse; and the burden was insignificant given the ongoing correspondence and telephone calls between the Bureau and the Appellant.

will ever be issued.[14] While it may make sense to delay issuance when it is known that an experience-rated company is not in business in the year in question, in this case, the Bureau knew in January 1992 that Woody Landscape had been continuously in business. Therefore, once it had the data needed to calculate the experience modification for this in-operation company, there was no reasonable justification to delay waiting for a policy.

As Ms. Keys admitted, with nine months of 1990 SCIF data, "[w]e had the data to calculate the [1991] experience modification. We did not have a policy to apply that mod to. So, we were waiting to get the policy in order to issue the mod." (RT 62.) Without the support of the no-policy rationale, the 1991

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[14]During the 1994 public hearing on proposed changes to the commissioner's regulations necessary to accomplish the transition from the minimum rate law to open rating, a proposal was made to amend the Experience Rating Plan to specifically require the Bureau to issue experience modifications 60 days prior to an insured's normal anniversary date. Under the proposal, untimely experience modifications increasing premium would be effective as of their date of issuance, not retroactively.

In rejecting the proposed amendment, the commissioner found in part that "[i]t is. . . unclear if delays in promulgation of experience modification [sic] are in fact a problem now or will be under open rating." The commissioner directed the Bureau to study the issue and report its findings to the Department of Insurance by January 31, 1996. That report itself is now late. See File No. RH-325, September 21, 1994.

modification could have been issued early in 1992[15].

The one year delay following October 1993 was attributed by the Bureau's witness to the possible misclassification of employees by the carrier during the December 1990-December 1991 period. But the Bureau offered no explanation why the experience modifications could not have been published, with notice to the carriers that a revision was possible after investigation into the classification question. The classification for the 1990-1991 year was not "obviously" inaccurate or erroneous[16] as required for delay under Gold Coast Harvesting. This course would have allowed notice to the carriers of the potential revision and most important, notice to the employer. It would have enabled the employer to price its services to cover the extra premiums for at least the entire 1994 policy year.

There are many policy reasons supporting the timely issuance of an experience modification. As noted in Gold Coast Harvesting, a timely issuance provides:

an accurate basis for the insurer and insured to

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[15]The 1991 experience modification is not in issue in this case.

[16]It is noted that in fact the investigation did not lead to a change in classification prior to the January 1995 publication of the experience modifications.

> compute premium for the upcoming policy period, allows the insured to factor premium into its projected cost of doing business, and provides the insured with a basis upon which to determine whether its loss control practices are sound or require modification.[17] (footnote from text.)
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> The Bureau's withholding of Appellant's experience modifications supported none of these purposes, was inconsistent with Manual General Rule VII, paragraph 11; specifically, the duty imposed upon the Bureau to issue experience modifications, and was unnecessary. Id. at p.20.

The same can be said regarding this case for the period after October 1993, at the latest.

Rule VII, paragraph 11(a)(4) of the 1994 Manual, which would affect the 1994 policy year, allows revision of the experience modification when the Bureau notifies the carrier within three months of the effective date or publication date of the erroneous modification that the erroneous modification is under review. If the Bureau's position is accepted that there are no limitations on revisions and retroactive effective dates if the change can be

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[17]Current Insurance Code section 11736 requires the Experience Rating Plan to "provide adequate incentives for loss prevention" and "sufficient premium differentials so as to encourage safety." One purpose behind this statutory mandate is to secure the safety of California employees.

Although Insurance Code section 11736 was adopted effective January 1, 1995, it is a declaration of preexisting law and public policy, and is appropriate to an examination of the issues presented by this matter.

cast as the result of the application of Rule (6), Section I, or Rule (16) Section III of the Plan, then there is even greater reason to publish as soon as possible to give notice to the employer and revise later.

With regard to the further delay due to holidays and paperwork, it need only be said that this additional delay was not in aid of gathering necessary information, and given the detriment[18] to the employer, was excessive. When agency delay is lengthy and works to disadvantage or prejudice other parties, it has been held that the delay converts to the bar of laches. (Brown v. State Personnel Bd. (1985) 166 C.A.3d 1151, 213 Cal.Rptr. 53, 58.)

B. Section I, Rule (6) Does Not Relieve the Bureau of the Duty to Publish Experience Modifications Expeditiously

It is beyond cavil that Section I, Rule (6) of the 1989 Plan, and its subsequent incarnations give the Bureau authority to take lawful action to preclude evasion of experience modification. The same policy reasons justifying experience modifications themselves (see infra at p.19) justify the prevention of evasion. But, the Bureau's argument that its delay

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[18]Appellant's insurer sued it for more than $54,000 in back premiums as the result of the retroactive experience modifications.

was not unreasonable because, *a fortiori*, under Section I, Rule 6 of the 1989 Plan, it can "take any action permitted by law to preclude such evasion", is mistaken. Not only is the lack of an appealable determination of evasion questionable legally, but unreasonable delay, if it can be called "action", is not excused by Appellant's earlier wrongdoing.

In Gold Coast Harvesting, Inc., the C&R committee noted:

> its concern regarding the policyholder's lack of notice that it had become eligible for experience rating and requested that the Bureau review the feasibility of notifying the policyholder when it becomes eligible for an experience modification which is being withheld due to a subterfuge investigation.

The committee was rightly concerned in that case, but for some unknown reason not in this one, about the infringement on an employer's due process rights to notice. This case raises that issue not only because of the lack of notice of the impending experience modification, but because of the potential outcome of the determination that there was an evasion under Rule (6), Section I. In another context the U.S. Supreme Court has held that due process includes giving "fair notice of the reach of [a] procedure." (In Re Ruffalo (1968) 390 U.S. 544, 551.)

Here, the Appellant was never informed until 1995 that the Bureau determined it had evaded experience modification, or of

the potential for unlimited retroactive experience modifications as a result. There is no cognizable reason, given the potential consequences, that a formal written determination should not be served on the evading employer at the earliest possible time. While in this case the Appellant does not challenge that determination, generally that determination is subject to challenge,[19] and such a challenge should be made close in time to the determination while memories are fresh, and documents and witnesses available.

In addition to the inherent unfairness of lack of notice of the determination of evasion itself, it is unfair to depend upon the wrongdoing that ended in May 1992 for carte blanche to penalize the employer indefinitely. "A person is not placed forever entirely outside the protection of the law in a particular transaction, because, forsooth, some time in the distant past he was guilty of an improper act." (Nealis v. Carlson (1950) 98 C.A.2d 65, 69.) The Bureau's view that Appellant's past wrongdoing excuses the part of its delay that is

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[19]Section I, Rule (6) provides for appeal in accordance with Manual Rule XII. The Commissioner has construed Manual Rule XII section 2 to require appeal from a Bureau decision within twelve months. American Securities & Investments, Inc., and American Textile Maintenance Company v. WCIRB File No. ALB-WCA-94-4.

otherwise unreasonable cannot be accepted.[20]

Moreover, by its terms, Rule (6) Section I allows the Bureau to take action to preclude evasion. Merriam's Webster's Collegiate Dictionary, 10th Ed. defines "preclude" as "to make impossible by necessary consequence: rule out in advance". It is apparent that releasing modifications late and applying them retroactively does nothing to make impossible by necessary consequence, or to rule out in advance, evasion in the years in question here, or even in future years. Additionally, Exhibit A to the Bureau's brief, a Bureau Bulletin from 1985 regarding application of experience modifications in labor contractor arrangements, clarifies that the "preclusive" aspect referred to is the separate policy required for the experience-rated client of a labor contractor.

Here, the Bureau did not take action to preclude evasion. Rather, it very slowly sought one bit of information from one source at a time, when it could have requested all information needed from all possible sources in its first correspondence with

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[20]Again, the Bureau has the implied ability under Rule VII, Section 11 to revise experience modifications retroactively without limitation when the revision is made necessary by application of Rule (6) Section I. But under Gold Coast Harvesting, it cannot withhold the modifications objectively capable of being calculated.

them, in an overall saving of effort and time. By its piecemeal investigation, it allowed continued evasion for years.

Examples of actions to preclude evasion could have taken place at the beginning of the investigation in this case. SCIF applied the 1989 experience modification to its separate policy for Woody Landscape, which covered October 1989 to July 1990. In or before April 1992, when the Bureau contacted Contractors Resource's carriers of the policies incepting in 1990, it could have strongly urged[21] the carriers to apply the immediately preceding modification, as allowed under Manual Rule VII, paragraph 5, on the separate policies required pursuant to Rule 16, section III of the Plan. Potentially then, if the carrier did apply the 1989 modification, in a domino effect, all subsequent carriers could have applied that modification until the Bureau issued the subsequent modifications. At that point, revision would be allowed under Manual Rule VII, paragraph 11 as well as paragraph 5. Additionally, as noted previously, the 1991 modification could have been issued in 1992 and carried forward until the 1992 and successive modifications were issued.

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[21]Presumably, if the Bureau can do anything under Rule (6) Section I, it could have insisted the carriers apply the 193% modification, rather than simply urge its use.

In sum, the Appellant's status as an evader of experience modification for a period ending in May 1992 does not give the Bureau carte blanche to unreasonably delay the publication of an experience modification for 1994. That status determination only allows the Bureau to retroactively revise experience modifications and to take lawful action to preclude evasion.

DETERMINATION OF ISSUES

The California Insurance Code, Experience Rating Plan and Workers' Compensation Insurance Manual impose a duty upon the Bureau to publish experience modifications and favor the issuance of experience modifications prior to their effective dates.

A reasonable delay in the publication of an experience modification is justified where data used to compute the modification is incomplete, obviously inaccurate or erroneous.

No provision of the California Insurance Code, Experience Rating Plan and Workers' Compensation Insurance Manual requires or authorizes the Bureau to withhold the publication of an experience modification that is objectively capable of computation. The 1991 experience modification was objectively capable of computation in 1992. The 1992, 1993 and 1994 experience modifications were objectively capable of computation

in October 1993, because, so far as the Bureau knew, there was no more data on the preceding periods and the classification for the 1990-1991 year was not "obviously" inaccurate or erroneous.

The delay from October 1993 to January 1995 was unreasonable, therefore, under Gold Coast Harvesting, File No. ALB-WCA-94-1. This is particularly so in light of the detriment to the employer, who had no notice of the potential for the retroactive application of delayed experience modifications.

Neither Section I, Rule (6) of the Experience Rating Plan or General Rule VII, paragraph 11, of the Workers' Compensation Insurance Manual, through its exception, supports the Bureau's unlimited authority to withhold experience modifications objectively capable of calculation, to the detriment of the employer.

The Bureau's withholding of Appellant's experience modification after October 1993 was contrary to the duty to issue experience modifications imposed by the California Insurance Code, Experience Rating Plan and Workers' Compensation Insurance Manual and inconsistent with the provisions of and process set forth in General Rule VII, paragraph 11, of the Workers' Compensation Insurance Manual, allowing retroactive revision.