BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	
ROYAL T MANAGEMENT, INC.,	)	
	)	
Appellant,	)	
	)	
From a Classification Decision of	)	**FILE NO. AHB-WCA-02-25**
	)	
THE WORKERS' COMPENSATION INSURANCE RATING BUREAU,	)	
	)	
Respondent.	)	
	)	

ORDER ADOPTING PROPOSED DECISION AND DESIGNATING DECISION AS PRECEDENTIAL

The attached proposed decision of Presiding Administrative Law Judge Andrea L. Biren is adopted as the Insurance Commissioner's decision in the above-entitled matter. This order shall be effective _____. Judicial review of this decision may be had pursuant to California Code of Regulations, title 10, section 2509.76. Any party seeking judicial review of this decision shall lodge copies of the request for judicial review and the final judicial order on the request for judicial review with the Administrative Hearing Bureau of the California Department of Insurance.

Additionally, pursuant to Government Code section 11425.60, I hereby designate this decision as precedential.

Dated: _____ , 2003

John Garamendi
Insurance Commissioner

By: _____
JANICE E. KERR
Special Counsel

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PROPOSED DECISION

Introduction

The dispute underlying this appeal arises over the rates charged for Royal T Management, Inc.'s (Royal T or Appellant) workers' compensation insurance policy No. SA50-0600-20365, issued by Fremont Compensation Insurance Group for the 6/1/2000 to 6/1/2001 year. The rates charged are based on the job classifications assigned to Royal T's employees by Fremont on the direction of the Workers' Compensation Insurance Rating Bureau of California[1] (Rating Bureau or WCIRB).

[1] The Rating Bureau is a rating organization licensed by the Insurance Commissioner under California Insurance Code section 11750, et seq., to assist the Commissioner in the development and administration of workers' compensation insurance classification and experience rating systems. The Rating Bureau serves as the Commissioner's designated statistical agent for the purpose of gathering and compiling data developed under California workers' compensation and employers' liability insurance policies. (Ins. Code § 11751.5.)

Royal T appeals under Insurance Code section 11753.1[2] from the decision assigning Sheri Shaffer Gibson, Stephanie Deschenes and Rhea Ann Davis Bonilla, to Classification Code 9011 of the California Workers' Compensation Uniform Statistical Reporting Plan[3] (USRP), rather than Code 8740(1) for Ms. Gibson and Code 8810(1) for Ms. Deschenes and Ms. Davis Bonilla. For the reasons that follow, the decision to assign Code 9011 to these employees is affirmed.

Issue Statement

1) Under 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, are appellant's three employees, Gibson, Deschenes and Bonilla, correctly assigned to Classification Code 9011?

Procedural History

Royal T initiated these proceedings by filing a written appeal with the California Insurance Commissioner on July 31, 2002. Royal T disputes the July 2, 2002 WCIRB decision to apply Code 9011 to three of its employees. The case was initially assigned to Administrative Law Judge Marjorie Rasmussen but later re-assigned for hearing to Chief Administrative Law Judge Andrea L. Biren. After several status conferences, an exchange of documents, and the submission of a pre-trial brief by the Rating Bureau, live testimony was taken in a reported telephonic hearing on February 10, 2003. The Rating Bureau prepared a package of documents,

[2] Section 11753.1, subdivision (a), authorizes any person aggrieved by a rating organization's decision to appeal the decision to the Insurance Commissioner.

[3]The provisions of the Plan, including the Standard Classification System in Part 3, are part of the Insurance Commissioner's regulations, at title 10, California Code of Regulations, section 2318.6. The 2000 version of the Plan applies to the issues presented in this appeal because the policy at issue incepted during that year.

designated Exhibits 1 through 19 as the documentary evidence in the case. After the Appellant was given time to review the documents, by facsimile received February 20, 2003, Appellant agreed to the admission into evidence of Exhibits 1 through 19. Accordingly, Exhibits 1 through 19 were admitted into evidence by written order on March 12, 2003 and the record was closed. This proposed decision follows.

Brent L. Turnbull, the corporate accountant, appeared as the representative for Appellant at the hearing and argued on Appellant's behalf. He elicited testimony from the three employees whose classifications are at issue. John N. Frye appeared as counsel for the Rating Bureau. Warren Clark, Rating Bureau Vice-President of Classification and Audit Review, appeared and testified as an expert witness on classifications on behalf of the Rating Bureau.

Parties' Contentions

Royal T contends that although each of three employees at issue resides in properties managed by Royal T, they do no work at the properties, have no risk exposure at the properties related to their work and therefore should not be classified in Code 9011 –"APARTMENT OR CONDOMINIUM COMPLEX OPERATION – N.O.C. – not Homeowners Associations – all other employees – including on-site managers, resident employees and resident Clerical Office Employees." Instead, Royal T believes that for Sheri Gibson, who is a property supervisor, the correct classification is code 8740(1), "APARTMENT OR CONDOMINIUM COMPLEX OPERATION – N.O.C. – property management supervisors – not resident or on-site managers or supervisors." For Stephanie Deschenes and Rhea Ann Davis Bonilla, Royal T believes that the correct classification is "CLERICAL OFFICE EMPLOYEES – N.O.C." – code 8810(1).

Respondent, the Rating Bureau, contends that because these employees reside at facilities for which Royal T is the property manager, they are appropriately classified in Code 9011 – "APARTMENT OR CONDOMINIUM COMPLEX OPERATION – N.O.C. – not Homeowners Associations – all other employees – including on-site managers, resident employees and resident Clerical Office Employees." Respondent contends that the classification explicitly and for good policy reasons includes resident employees like Ms. Gibson and resident clerical office employees like Ms. Deschenes and Ms. Bonilla, even though these resident employees do not work at their living facilities.

FINDINGS OF FACT

What the Business Does & the Duties of These Employees

There are no factual disputes in this case. Royal T Management is and was during the policy period a property management company. Among the many properties that the company manages are the properties at which the three employees at issue reside. Most of the company's employees are classified in code 9011 "APARTMENT OR CONDOMINIUM COMPLEX OPERATION – N.O.C. – not Homeowners Associations – all other employees – including on-site managers, resident employees and resident Clerical Office Employees."

For the June 1, 2000 to June 1, 2001 period, Sheri Shaffer Gibson was the office manager at the Bakersfield office of the company as well as a property management supervisor. In that period, she worked at the Stein Road office but lived at the Sandcreek Apartments on Ash Road managed by Royal T. However, she was not the property management supervisor for the Sandcreek facility. She performed no job duties at the Sandcreek facility.

For the June 1, 2000 to June 1, 2001 period, Stephanie Deschenes was the Administrative Assistant at the Fresno office of the company on N. Fruit St. She resided at the Hyde Park Apartments on N. Valentine in Fresno managed by Royal T. She performed no job duties at her residence.

For the June 1, 2000 to June1, 2001 period, Rhea Ann Davis Bonilla was the Administrative Assistant at the Bakersfield office of Royal T on Stein Road, while living at the Elmwood Apartments on Q Street in Bakersfield managed by Royal T. She performed no job duties at the Elmwood Apartments.

Although rent was deducted from the paychecks of each employee, it is undisputed that there was no rent reduction for work performed at their places of residence.

Interpretation of Code 9011

The Rating Bureau offered the minutes of its Classification & Rating Committee from August 1993, as evidence that the intent behind the creation of this classification was precisely to include "all resident employees, regardless of duties or job title, under the proposed classifications…." (Ex. 2, p. 40.[4])

Additionally, the Rating Bureau publishes a volume known as the California Workers' Compensation Uniform Statistical Reporting Plan Supplement every year. In the year 2000, the Rulings and Interpretations section of this volume stated, under the heading "Property Management Firms," "[t]he term 'resident' or 'residing' shall refer to those employees whose primary residence is located at the property under management." (Ex. 1, p.3.)

[4] The Joint Exhibits admitted as evidence in this case are referred to herein as Ex. #. All page numbers for exhibits refer to the Bates Stamp number in the lower left hand corner of the page.

In two different inspections done by the Rating Bureau (in December 2001 and Dec 2002), the conclusion was that these employees belonged in code 9011. (Ex. 5 and Ex. 18.)

Warren Clark, an expert in classification procedure, reviewed the operations of Royal T and concluded that the employees at issue were properly classified in code 9011 and no other classification code was more accurate. In the context of this case, he did seek confirmation of the WCIRB staff's longstanding policy of interpreting code 9011 to include all residing clerical office employees, but a senior staff member of the WCIRB declined to submit the interpretation to the WCIRB's Classification and Rating Committee.

LEGAL ANALYSIS

The Insurance Commissioner's Regulations

The provisions of the California Workers' Compensation Uniform Statistical Reporting Plan are part of the Insurance Commissioner's regulations, at title 10, California Code of Regulations, section 2318.6. The rating organization designated by the Commissioner is legislatively mandated to develop rules, subject to the approval of the Commissioner, related to the classification system in effect. (Ins. Code §11734(c).) Quasi-legislative rules such as these have the dignity of statutes and must be given effect. (*Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10.)

The Plan contains an extensive listing of rating classifications for various occupations, employments, industries and businesses known as the standard classification system. At its outset, the standard classification system states its objective:

> 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.
>
> (USRP, Part 3, Section I.)

In Part 3, Section II, the Plan sets forth general classification procedures. Generally, any business or operation specifically described by a classification shall be assigned that classification. Moreover, under the Single Enterprise rule,

> 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 provisions contained herein specifically provides for such division of payroll. Division of payroll shall be made as provided hereinafter in respect to standard exceptions and general exclusions.
>
> (USRP, Part 3, Section II, paragraph 2.)

Discerning the Appropriate Classification Code

There appears to be no dispute that the governing "single enterprise" classification for Royal T is classification code 9011; most of its employees are classified under this code number because it specifically describes the business of Royal T, i.e., apartment or condominium complex operation, with the standard exception of its clerical employees (code 8810(1)) and some off-site property managers (code 8740(1)). Appellant claims that these exceptions should also apply to the three employees at issue here, both because the jobs they hold are "otherwise classified" in codes 8810(1) and 8740(1), and because they do no work at their residences.

Our analysis must begin with the language of the single enterprise classification code -- 9011. "APARTMENT OR CONDOMINIUM COMPLEX OPERATION – N.O.C. – not Homeowners Associations – *all* other employees – *including* on-site managers, resident

employees and resident Clerical Office Employees." (Emphasis added.) It contains specific words and phrases that are further explained within the plan.

Pursuant to USRP, Part 3, Section V, "Classification Terminology," paragraph 1,

> "if a classification carries a descriptive phrase beginning with *all,* as in the expression *all employees, all other employees* ...division of payroll shall not be made for any employee or operations (other than the standard exceptions or general exclusions), without regard to the location of such operations, except for an operation not incidental to and not usually associated with the enterprise described by such a classification."

Pursuant to USRP, Part 3, Section V, "Classification Terminology," paragraph 2, "if a classification carries a descriptive phrase *including* certain operations, division of payroll shall not be made for such operations, even though they may be specifically described by some other classification or may be conducted at a separate location." For classification code 9011, the included operations are those of on-site managers, resident employees and resident clerical employees, even though the operations they perform may be described by some other classification or conducted at a separate location.

Paragraph 2 is the more inclusive, but taken together, these two explanations indicate that Royal T may not divide out the payroll of resident employees and resident clerical office employees[5] from the governing classification 9011.

There is still the question whether these particular employees are "resident employees or resident clerical office employees" within the meaning of the classification. There is ambiguity

[5] The rule allowing for a standard exception for clerical office employees explicitly states that the payroll of such employees can be divided from all other classifications "unless the classification phraseology specifically provides for the inclusion of such employees." (USRP, Part 3, Section II, paragraph 4.) Here, classification code 9011 does specifically include resident clerical office employees. For these employees, the standard exemption would not apply.

in the phrasing. It could mean "employees who work where they live" or it could mean "employees and clerical office employees who live at properties managed by their employer no matter where the employees work". When there is ambiguity in the wording of a statute or rule, it is appropriate to look at the intent of behind it,[6] as well as to look at the words in context. (*Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1386-1387.)

The minutes of the Classification and Rating Committee from 1993 (Exhibit 2) constitute some of the material before the Commissioner at the time of the decision to promulgate the new classification code 9011. At page 37, the minutes indicate that there was a continuing problem with ascertaining the appropriate classification for resident managers on a property because the insurers and the employers disagreed whether the managers did any work other than clerical work. As a further reason for creating a new classification including all resident employees, the Committee noted that "[f]urther, residing employees create a 24 hour exposure for which an employer is legally liable." (Ex. 2, p. 28.) But the document does not explicitly discuss the situation posed here, where employees live on a property but all agree they do no work at the property. There is no direct mention of the irrelevance of "location of work performed." The implication, however, is that because of employee status, there is the potential for liability even in this situation.

While the discussion in the minutes does not completely clarify the intention behind the new classification code, the actual change in language from the prior code to 9011 sheds a little more light. The proposal before the Commissioner was to change the language from "including

[6] Administrative regulations are subject to the same rules of construction and interpretation that apply to statutes. (*Inter Valley Health Plan v. Blue Cross/Blue Shield* (1993) 16 Cal.App.4th 60, 69, cert. denied 510 U.S. 1073 (1994).

resident or on-site managers" to "including on-site managers, resident employees, and resident Clerical Office Employees." (Ex. 2 at p. 40.) It is undeniable that the new language expands the coverage of the classification. Since the use of the word "including" means that the separate location of the work performed by the resident employees and resident clerical employees is irrelevant, it follows that the meaning of "resident" in this context must be the more expansive one – an employee who lives at a property under management by the employer but who doesn't necessarily work at the residence.

It is appropriate also to find some guidance in the interpretation of the agency charged with administering a rule or statute. As the California Supreme Court said in *Yamaha, supra*, 19 Cal.4th at p. 10, an administrative agency possesses expertise "that is the source of the presumptive value of the agency's views." The WCIRB's expert witness testified that it was "the Bureau's longstanding procedure [to apply] the classification literally and assign [] all residing clerical office employees of apartment or condominium complex operations to Classification 9011." (Transcript, p. 24.)

In keeping with this procedure, the WCIRB has for many years publicized its established practice with regard to the meaning of "resident" or "residing" through the Rulings and Interpretations segment of the USRP's published Supplement, although the Supplement's Rulings and Interpretations do not have the direct imprimatur of the Commissioner. At page 31 of the Rulings and Interpretations segment, under "Property Management Firms," the WCIRB states "[t]he term "resident" or "residing" shall refer to those employees whose primary residence is located at the property under management." The interpretation does not include the necessity for the employee to also work at the residence property.

The interpretation is reasonable given the defined meaning of the word "including" in the language of the classification itself, the potential liability imposed by resident employees and the administrative need to avoid the burden of determining whether an employee who only resides at a property might ever deliver a package or even a message to an employee working on-site.

Having determined that the phrase "resident employees" includes those who live but do not work at a managed property, the phrase "N.O.C." in code 9011 eliminates the possibility of using code 8740(1) or 8810(1) for the three employees at issue here. N.O.C. is the abbreviation for "not otherwise classified." (USRP, Part 3, Section V, paragraph 4.) This allows the off-site non-resident property managers to be separately classified under the more apt classification code 8740(1) for those property managers who are not "resident" or "on-site" managers. Non-resident clerical employees who work at the property can be classified in code 8810(1). But for the three employees at issue here, code 9011 is the most descriptively accurate classification and they cannot be otherwise classified.

Thus, although other employees of Royal T who do not reside at properties managed by Royal T are classified as property managers under code 8740(1)[7] and other clericals are classified under code 8810(1)[8], the employees at issue here cannot have their payroll divided out of the governing classification because they are explicitly *included* in the classification since they do reside at properties managed by Royal T and are "resident employees" and "resident Clerical Office employees."

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[7] Moreover, Classification 8740(1), also contains the "N.O.C." as well as saying "not resident . . . supervisors" and thereby excludes the more specifically described "resident employee" in code 9011.

[8] Similarly, 8810(1) also includes the phrase "N.O.C." Since the two clerical employees at issue in this case are more descriptively classified in code 9011, they would be excluded by this phrase from code 8810(1).

Appellant argues that it makes no sense to include people who do not work at their residences in this classification because there is no elevated risk. On a risk assessment basis, Appellant contends, they are more like the carved-out classifications of 8810(1) and 8740(1). While this view is understandable, Appellant does not take into account the broad spectrum of jobs that the WCIRB's classifications must encompass. Since the objective is to find a classification that covers the operations of an entire enterprise, the classification always covers a broad range of risks. For code 9011, this risk includes the relatively low risk presented by resident employees and clerical office employees who do not work at their residences. By classifying businesses, as opposed to specific jobs, the Rating Bureau is regularly blending a range of risks to arrive at a rate that is neither the "fair" rate for the most dangerous job included nor for the safest job included. But the blended rate is fair overall for that type of business.

Moreover, while the Supplement submitted has no legal authority, it does show that the Rating Bureau applies code 9011 evenhandedly and consistently to similarly situated businesses. Here, the WCIRB has included in the calculation of a suggested rate for 9011 employees the risk of loss common to employers of such employees. It is unlikely that Royal T is the only management company that has employees who live in property managed by the employer but do not work at those properties; there is no competitive disadvantage to Royal T in applying this classification code in keeping with the longstanding interpretation.

The Rating Bureau must apply the rules of the Plan equally to all employers. It cannot make an exception for an individual employer if the employer does not qualify for an exception. Classification Code 9011 was the correct classification for these employees for the June 1, 2000 to June 1, 2001 period.

DETERMINATION OF ISSUES

For the reasons set forth above, Classification Code 9011, "APARTMENT OR CONDOMINIUM COMPLEX OPERATION – N.O.C. – not Homeowners Associations – all other employees – including on-site managers, resident employees and resident Clerical Office Employees" was correctly applied to the payroll of Appellant Royal T's employees, Deschenes, Gibson, and Davis Bonilla, because in the year at issue they lived at properties managed by Royal T, even though they did not work at those properties. The assignment of this classification code was in keeping with the provisions of the USRP and no exceptions applied.

ORDER

The decision of the Workers' Compensation Insurance Rating Bureau to assign Classification Code 9011 to Appellant's employees, Deschenes, Gibson and Davis Bonilla is affirmed.

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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: March 13, 2003

_____

ANDREA L. BIREN
Administrative Law Judge
Department of Insurance