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BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	
UPM GLOBAL, LLC,	)	
	)	
Appellant,	)	FILE AHB-WCA-08-29
	)	
From the Decision of the	)	
	)	
ZENITH INSURANCE COMPANY,	)	
	)	
Respondent.	)	
	)	

PROPOSED DECISION

INTRODUCTION

This appeal is brought pursuant to California Insurance Code section 11737, subdivision (f), and arises from a dispute over premium rates charged by Zenith Insurance Company ("Zenith") for workers' compensation insurance provided to Appellant UPM Global, LLC ("Appellant") under Policy Number C064707905 for the 2007 policy year (June 30, 2007-June 30, 2008).[1]

[1] Section 11737, subdivision (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 . . . ."

The dispute arises from disagreement over the proper classification assignment for the payroll of one of Appellant's employees, Sanford Fishman, who functioned during the entire policy period at issue as a property asset manager for Appellant's commercial properties. Appellant appeals from the decisions of Zenith and the Workers' Compensation Insurance Rating Bureau ("WCIRB") to assign the payroll for this employee to classification 9009 [Building Operation—commercial properties—all other employees], instead of classification 8740(2) [Building Operation—commercial properties—property management supervisors], pursuant to the California Workers' Compensation Uniform Statistical Reporting Plan ("USRP").

For the reasons set forth below, the decisions by WCIRB and Zenith to assign the payroll of Appellant's property asset manager to classification 9009 are affirmed.

ISSUE STATEMENT

Under the California Code of Regulations, title 10, section 2318.6, and the Standard Classification System, Part 3, of the USRP, did Zenith or the WCIRB err in assigning the payroll for Appellant's property asset manager to classification 9009, rather than to classification 8740(2)?

PROCEDURAL HISTORY

Appellant initiated these proceedings on September 29, 2008, by filing a written appeal to the Insurance Commissioner from WCIRB's September 3, 2008, decision[2] and Zenith's September 8, 2008, decision[3] rejecting Appellant's claim that they should assign the payroll for Appellant's property asset manager to classification 8740(2).

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[2] Exhibit 7.
[3] Exhibit 8.

On December 2, 2008, the parties filed a written stipulation to waive their right to a live evidentiary hearing and stipulating to certain agreed-upon facts. On January 23, 2009, the parties filed a Joint Exhibit List, with Exhibits 1 through 12, attached. The documents were admitted into evidence pursuant to the parties' stipulation and consist of the following:

1) Zenith Workers' Compensation Insurance Policy No. C064707905.

2) Final Audit Worksheets for Zenith Workers' Compensation Insurance Policy No. C064707905.

3) Revised Final Audit Worksheets for Zenith Workers' Compensation Insurance Policy No. C064707905.

4) August 25, 2008, letter from Karen Erickson (Zenith Premium Audit Manager) to Jeffrey Solomon (UPM Global, LLC).

5) August 27, 2008, e-mail from Jeffrey Solomon to Melinda Barton and Pamela De Guzman.

6) August 27, 2008, letter from Karen Ericson to WCIRB.

7) September 3, 2008, letter from WCIRB to Karen Ericson.

8) September 8, 2008, letter from Karen Ericson to Jeffrey Solomon.

9) May 14, 1999, WCIRB Classification Inspection Report.

10) April 21, 2006, WCIRB Classification Inspection Report.

11) C&R Minutes dated June 8, 2004.

12) C&R Minutes dated August 10 and 20, 1993.

Exhibits 1 through 12, Appellant's Brief (filed December 2, 2008), Zenith's Brief (filed January 14, 2009), and WCIRB's Brief (filed January 14, 2009) comprise the record in this case.[4] The Administrative Law Judge ("ALJ") closed the record on February 9, 2009, and the matter stood submitted for decision.

[4] Although the Status Conference Order filed November 12, 2008, provided for Appellant to file a Reply Brief by no later than January 23, 2009, Appellant did not file a Reply Brief.

THE PARTIES' CONTENTIONS

Appellant contends the payroll for its property asset manager should be assigned to classification 8740(2) [Building Operation—commercial properties—property management supervisors], rather than classification 9009 [Building Operation—commercial properties—all other employees], because he does not directly supervise employees engaged in the operation, maintenance, and care of Appellant's properties. Instead, there is a separate maintenance engineer, whom the property asset manager does not supervise.[5]

Zenith contends the payroll for Appellant's property asset manager is properly assigned to classification 9009, because classification 8740(2) "may be assigned only in cases where property management supervisors exercise direction through on-site property managers, or when all operation, maintenance, and care activities are conducted by separate concerns, and no payroll is developed under Classification 9009...."[6] Since Appellant employed a maintenance engineer, whose payroll was assigned to classification 9009, but there was no layer of supervision between him and the property asset manager, classification 8740(2) was not appropriate for the work of the property asset manager.[7] Zenith asserts that, for a period of time before the policy period at issue in this proceeding, licensed subcontractors did all of Appellant's repairs, so assignment of the property manager's payroll to classification 8740(2) was appropriate; however, when Appellant employed its own maintenance engineer, reassignment of the property manager's payroll to classification 9009 became appropriate.[8]

WCIRB contends assignment of the property manager's payroll to classification 9009 is appropriate, unless the manager's work meets the criteria specified in classification 8740(2). By

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[5] Appellant's Brief, pp. 1-2.
[6] Zenith Brief 2:14-22.
[7] Zenith Brief 2:22-27.
[8] Zenith Brief 3:2-17.

its terms, classification 8740(2) is only appropriate where supervisors exercise direction through managers who directly supervise employees or where supervisors oversee commercial properties where separate concerns handle all the maintenance work. Otherwise, the footnote definition in classification 8740(2) requires assignment to classification 9009.[9]

FINDINGS OF FACT

Based on the parties' stipulation, the ALJ finds, by a preponderance of the evidence, that Appellant employed Sanford Fishman, for the entire policy period, as an off-site property asset manager of certain commercial properties owned by Appellant, and Mr. Fishman's duties included tenant relations and complaints, lease negotiations, rental collections, and monthly reporting. Further, Mr. Fishman was the superior of a maintenance engineer employed by Appellant during the policy period, although Mr. Fishman did not direct the day-to-day activities of the maintenance engineer.

The ALJ further finds that payroll for both Appellant's property asset manager and maintenance engineer were assigned to classification 9009, and there was no intermediate level of supervision between the two employees.[10] Further, but for a period in 2006 (before the policy period at issue in this proceeding), Appellant employed a maintenance worker in addition to its property asset manager, and payroll for Appellant's property asset manager was always assigned to classification 9009. During that period in 2006, Appellant did not employ a maintenance worker, but contracted with outside firms for all maintenance activities, and payroll for Appellant's property asset manager was assigned to classification 8740(2).[11]

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[9] WCIRB Brief, pp. 3-4.
[10] Exhibit 3, p. 2.
[11] Exhibits 9 and 10.

DISCUSSION

The Regulatory Scheme.

The provisions of the USRP are part of the Insurance Commissioner's regulations, at title 10, California Code of Regulations, section 2318.6. WCIRB is the rating organization designated by the Commissioner to develop rules, subject to the approval of the Commissioner, related to the classification system. (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 USRP 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.) However, the USRP recognizes that some operations may consist of a "combination of related companion classifications." (USRP, Part 3, Section I, Rule 8.) In the case of the property management industry, there are six pairs of companion classifications, including the pair in issue, namely for management of commercial properties: classification 8740(2) [Building Operation—commercial properties—property management supervisors] and classification 9009 [Building Operation—commercial properties—all other employees]. (USRP, Part 3, Section VII, "Property Management/Operation."[12]) Assignment of

[12] See Exhibit 11, p. 10: besides management of Commercial Properties, the other branches of the property management industry with pairs of companion classifications are Apartment or Condominium Complex Operation (8740(1) and 9011); Building Operation (8740(3) and 9015(1); Mobile Home Park Operation (8740(4) and 9010);

the payroll of the commercial property asset manager to one or the other of those two classifications depends on their specific footnote definitions. (USRP, Part 3, Section I, Rule 5.)

As between classification 8740(2) and classification 9009, the footnote definition of classification 8740(2) is the more specific. Classification 8740(2) applies to property management supervisors "who exercise direction through managers who directly supervise employees engaged the operation, maintenance and care of properties" or "who supervise and oversee commercial properties at which all operation, maintenance and care activities are conducted by separate concerns." The footnote definition of classification 8740(2) further provides, "Property managers not meeting the above conditions shall be classified as 9009." Thus, if Appellant's property asset manager does not qualify as a "property management supervisor," as specifically defined in classification 8740(2), then his payroll must be assigned to classification 9009 (*i.e.*, "all other employees"), and there shall be no division of Appellant's payroll between two classifications. (See USRP, Part 3, Section I, Rules 1 and 5.)

Analysis.

There is no dispute as to the basic facts of this case. The parties stipulated that, at all relevant times, Appellant employed a property asset manager and a maintenance engineer. There is no evidence that Appellant employed any intermediate supervisory level employee who managed the activities of the maintenance engineer. Further, while independent contractors carried out the operation, maintenance, and care activities for Appellant's properties for a period prior to the relevant policy year, there is no evidence that those separate concerns did all such work during the relevant policy year. Indeed, Appellant's employment of the maintenance engineer implies that separate concerns did not do all of Appellant's maintenance, operation, and

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Warehouses (8740(5) and 8290); and Apartment or Condominium Complex Operation for Seniors (8740(6) and 9007).

care work. Thus, Appellant's property asset manager does not satisfy the specific definition of "property management supervisor" in classification 8740(2), and his payroll must be assigned to classification 9009.

Even giving full credence to Appellant's argument, one must arrive at the same conclusion. Appellant contends that the maintenance engineer is his own supervisor.[13] By implication, at least some of the operation, maintenance, and care of Appellant's properties is conducted by Appellant's maintenance engineer and not by separate concerns. Further, Appellant's property asset manager does not exercise direction of Appellant's maintenance engineer through a manager. Thus, Appellant's property asset manager does not qualify as a "property management supervisor," as defined in classification 8740(2), and his payroll must be assigned to classification 9009 (*i.e.*, "all other employees").

While Appellant's view that its property manager is more like a property management supervisor than a maintenance worker is understandable, Appellant does not take into account the broad spectrum of jobs that WCIRB's classification 9009 must encompass. Since the objective is to find a classification that covers a range of operations within an enterprise, the classification frequently covers a range of risks. For classification 9009, which covers "all other employees" who do not fit the specific description of "property management supervisor" in classification 8740(2), this includes the relatively low risk presented by property asset managers and the potentially higher risk presented by maintenance workers. This amalgamated or "blended" rate provides simplicity of administration, the benefits of a blended rate for all types of employees within a business, and the further benefits of statewide statistical averaging. A blended rate such as classification 9009 provides benefit to the employer by combining the rates

[13] Appellant's Brief, p. 1.

for lower hazard jobs with the rates for higher hazard jobs within a single enterprise. While a blended rate may appear unfair with regard to individual employees, its overall effect is generally not unfair. Indeed, removing the lower risk activities of the property asset manager from the blended rate would require higher premiums for the remaining, more hazardous jobs of maintenance engineer. (See the precedential decision in *In the Matter of the Appeal of Royal T Management, Inc.*, AHB-WCA-02-25, at p. 12.[14])

CONCLUSION

Pursuant to California Code of Regulations, title 10, section 2509.61, subdivision (a), a "party has the burden of poof 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, the ALJ finds that WCIRB and Zenith have met their burden of proof by showing that the payroll for Appellant's property asset manager was properly assigned to classification 9009 (Building Operation—commercial properties—all other employees). Appellant failed to meet its burden of demonstrating the contrary. Therefore, for Appellant's 2007 policy year, the determinations by WCIRB and Zenith to assign the payroll for this employee to classification 9009 [Building Operation—commercial properties—all other employees], instead of classification 8740(2) [Building Operation—commercial properties—property management supervisors], pursuant to the USRP, are affirmed.

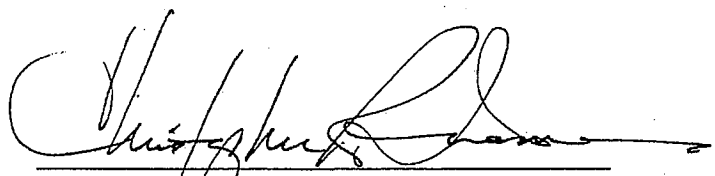
[14] Precedential decisions are those administrative law decisions that the Insurance Commissioner designates as being suitable to cite as precedent in subsequent insurance administrative law decisions (Gov. Code Section 11425.60).

ORDER

1. The decisions by WCIRB and Zenith to assign the payroll for Appellant's property asset manager to classification 9009 [Building Operation—commercial properties—all other employees] for the 2007 policy year are 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: February 27, 2009.



CHRISTOPHER R. INAMA
Administrative Law Judge
Department of Insurance