

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

In the Matter of the Appeal of)	
)	
ADVANCED FUEL FILTRATION SYSTEMS, INC.,)	
)	
Appellant,)	FILE AHB-WCA-03-45
)	
From the Decision of)	
)	
STATE COMPENSATION INSURANCE)	
FUND,)	
)	
Respondent.)	
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ORDER ADOPTING PROPOSED DECISION

The attached proposed decision of Administrative Law Judge Marjorie A. Rasmussen is adopted as the Insurance Commissioner's decision in the above-entitled matter. This order shall be effective May 21, 2004. Judicial review of the Insurance Commissioner's decision may be had pursuant to California Code of Regulations, title 10, section 2509.76. Persons authorized to accept service on behalf of the Insurance Commissioner are listed below:

Chief Counsel Gary Cohen
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Any party seeking judicial review of the Insurance Commissioner's decision shall lodge copies of the writ of administrative mandamus and the final judicial decision and order on the writ of administrative mandamus with the Administrative Hearing Bureau of the California Department of Insurance.

Additionally, pursuant to Government Code section 11425.60, I hereby designate pages 12 – 18 contained under sub-caption "Decision" as precedential and remove *Allee Construction Company vs. WCIRB* (File No. ALB-WCA-94-15) from the list of designated precedents.

Dated: April 21, 2004

John Garamendi
Insurance Commissioner

By: /s/ Janice E. Kerr
JANICE E. KERR
Special Counsel
Department of Insurance

been engaged in excavation work during the 1999 and 2000 policy periods. (Reporter's Transcript, pp. 101-104; Exhibits 8.2, 8.3, 25 and 26.)

While all witnesses appeared to testify forthrightly, Mr. Parker's testimony on the issue of whether and when AFFS was engaged in excavation activities was based more on his recollection and a narrower definition of excavation than that defined by the Plan.¹ In contrast, the testimony of Ms. Wood and Ms. Fincher was based on their observations of AFFS's operations, their discussion with AFFS employees and, in Ms. Fincher's case, her additional review of the payroll records. On balance, SCIF's witnesses were more credible with respect to this question of fact.

Accordingly the administrative law judge finds that during the 1999 and 2000 policy periods AFFS's employees were engaged in operations properly assigned to classifications 7219 (01), 8081(01), 4511,6218 and 6220. Specifically, AFFS was engaged in excavation work as defined by the Plan as early as the final quarter of 2000, which falls within AFFS's 1999 policy period. (Reporters Transcript, pp. 104-114; Exhibit 26.)

Discussion

SCIF Properly Assigned Classification Codes 7219 (01), 8081(01), 4511, 6218 And 6220 To AFFS's 1999 And 2000 Policies Pursuant to Insurance Code Sections 11753.1 (b) and 11753.2(c)

Insurance Code section 11753.1(b) requires, in part, that "any insurer adopting a change in the classification assignment of an employer that results in an increased

¹ In his closing arguments on behalf of AFFS, appellant's counsel explained that, "Mr. Parker's definition of "excavation" is different from regular old tank repair. "Excavation" means digging a huge hole for something new. Mr. Parker certainly wasn't aware of that classification going back to tank repair and that's why he said '02." (Reporter's transcript, p. 120.)

premium shall notify the employer in writing . . . of the change and the reasons for the change.”

Insurance Code section 11753.2 sets forth the basis for and effective dates of changes in classification assignments on workers’ compensation policies. The effective date of a classification change depends, in part, on whether the change arises from an erroneous classification or insured’s change of operations.

Insurance Code section 11753.2(a) governs the effective date of a classification change due to an erroneous classification that results in a decrease in premium and Insurance Code section 11753.2 (b) governs the effective date of a classification change that results in an increase in premium.² Insurance Code section 11753.2(c) governs the effective date of a change of classification due to a change in an employer’s operations.³ The parties differ over whether Insurance Code sections 11753.2(b) or 11753.2(c) apply to the facts in this case.

SCIF contends that Insurance Code section 11753.2(c) applies to this appeal because AFFS’s operations changed. AFFS contends that the issue before the Commissioner deals with an erroneous classification and that Insurance Code section 11753.2 (b) governs this matter. AFFS also contends that SCIF failed to notify AFFS of the classification changes to its policy pursuant to Insurance Code section 11753.1(b).

² Insurance Code section 11753.2(b) states, in pertinent part, as follows: “If a change in a classification assignment on a workers’ compensation insurance policy is due to an erroneous classification and results in an increased premium, the classification change shall become effective on the effective date of the erroneous classification assignment . . .”

³ Insurance code section 11753.2(c) states as follows: “If a change in a classification assignment on a workers’ compensation policy is due to an insured’s change of operations, any resulting increase or decrease in premium shall become effective on the date of the change of operations.” The plan incorporates the above Insurance Code sections in Part 5, Section III, subsection 3.

AFFS premises its argument that Insurance Code section 11753.2(b) is applicable to the facts here on its claims that SCIF erroneously placed the entire payroll of AFFS's drivers into classification code 7219(1) "Trucking" instead of allocating this payroll between 7219(1) and 3724(1) "Millwright Work" for the policy years in dispute. Since SCIF did not notify AFFS of the classification changes to its policy until March 5, 2002, AFFS contends that these changes should be effective on March 5, 2002, rather than October 1, 1999. (Reporter's Transcript, p. 121.)

AFFS's argument fails for two reasons. First, Insurance Code section 11753.2(b) is not applicable to the facts in this appeal because the classifications SCIF added to AFFS's 1999 and 2000 policies were not erroneous. Mr. Parker admitted during his testimony that classification codes 7219(1) "Trucking" and 3724(1) "Millwright Work" accurately described appellant's operations during the policy years at issue and the evidence overwhelmingly proves that the remaining classifications SCIF added to the policies on March 5, 2002, correctly described the risks associated with AFFS's operations in 1999 and 2000.

Second, pursuant to the stipulation, AFFS withdrew the issue of whether SCIF should have segregated the payroll of AFFS's drivers between classification codes 7219(1) "Trucking" and 3724(1) "Millwright Work. (Reporter's Transcript, pp. 9-11.) Underlying the stipulation was the WCIRB's determination that AFFS had not submitted payroll records for its drivers in a manner that satisfied the requirements for payroll division that is contained in Part 3, Section VI, Rules 2 and 3 of the Plan and AFFS's concession of this fact. (Exhibit 35.) Merely because SCIF did not apportion the payroll

of AFFS's drivers between the two classifications does not make the assignment of these classifications erroneous.

As AFFS's business expanded in 1999, its operations changed. While each of the activities described by Classification Codes 7219 (01), 8081(01), 4511, 6218 and 6220 ultimately may have supported AFFS's primary business of petroleum-based product filtration, these activities nevertheless represent a significant change in AFFS's operational risks that are not reflected in the rates for the original three classification codes assigned to AFFS's 1995 -1998 policies. The evidence is clear that once SCIF endorsed the additional classifications on AFFS's policy, SCIF timely notified AFFS in writing on March 5, 2002, of this action in accordance with Insurance Code section 11753.1(b).

Based on the foregoing, SCIF correctly assigned additional classification codes to AFFS's 1999 and 2000 policies to reflect changes in AFFS's operations. The effective date of the classification changes is October 1, 1999, as mandated by Insurance Code section 11735.2(c) and Part 5, Section III subsection 3(b) of the Plan.

Despite the clear and convincing evidence in this matter, AFFS argues in the alternative that the classification codes should go into effect on March 5, 2002, because AFFS did not understand the classification system and was not aware that it should have reported to SCIF that its operations included additional risks under the Plan. In any event, AFFS argues, SCIF knew about appellant's trucking operations as early as December 2000 and should have conducted timely physical audits of AFFS each year. AFFS's arguments are not persuasive.

The rules and regulations contained in the Plan and published by the WCIRB are no different from any other regulation governing business practices in California. It is AFFS's responsibility to know and abide by these laws. Ignorance of the law, in this case, is no excuse. The policy documents and the written communications between the parties clearly indicate that the appellant was put on notice that it had the responsibility to notify SCIF of any changes in its operations that might impact the insured's risk. (Exhibit 16, p. 1 and Exhibit 17.)

The Plan permits a carrier to use the signed payroll statements from the employer in lieu of a physical audit of payroll records when the final premium is \$10,000.⁴ SCIF relied on AFFS's signed payroll statements during the 1995, 1996, 1997 and 1998 policy periods because AFFS's final premium was less than \$10,000. Based on the evidence, AFFS's labor force remained small and the description of AFFS's operations that SCIF received in 1997 indicated that its operations had not expanded. Thus, SCIF's reliance on AFFS's signed payroll statements to determine AFFS's final premium during the policy period from 1995 through 1998 was reasonable.

SCIF's policy documents notify the insured of when and how premiums are to be calculated and allow for premium audits to be conducted within three years of a policy's expiration. Based on the record, SCIF first learned of AFFS's new operations in December 2000 after AFFS's 1999 policy year had expired. This knowledge was used by SCIF in the course of its 1999 and 2000 audits of AFFS's policies. AFFS has provided no legal support, and none exists, for appellant's contention that the audits of its

⁴ Part 5, Section III, subsection 4(a) (2) of the Plan states, in pertinent part, as follows: "Each policy producing a final premium of less than \$10,000. shall be audited at sufficient intervals to ensure determination of proper payrolls. In each year when such a policy is not audited, a signed payroll statement shall be obtained from the employer."

policies should have been conducted in a different fashion or any sooner than they were by SCIF.

It is well recognized that individuals may suffer economic hardships for not being adequately insured.⁵ In California, all employers are required to obtain workers' compensation coverage for their employees. (California Labor Code section 3700.) Thus, it is a legal necessity that employers insure all their risks. In this case, ADFS's failure to keep its policy up to date did not result in a loss or denial of coverage but a larger premium bill. Unlike the premium for an automobile insurance policy that is determined at the policy's inception, premiums for workers' compensation insurance are calculated after a policy has expired because the coverage rates are based, in part, on the employer's operations and payroll that are subject to change. By not keeping its policy up to date as its operations changed, the monthly premiums ADFS submitted to SCIF were based on incomplete reporting and thus, were inadequate for the risk actually insured. Although it is a hardship, ADFS must pay SCIF now for what it should have paid SCIF earlier.

Conclusion

For the foregoing reasons, SCIF correctly assigned classification codes 8018 (stores – wholesale); 7219 (truckmen), 6218/6220 (excavation) and 4511 (analytical or testing laboratories) to ADFS's policy 1441416 effective October 1, 1999.

⁵ After the Northridge earthquake and the Southern California fires, the Commissioner has repeatedly warned California consumers to review and update their insurance policies, as necessary. With respect to workers' compensation insurance policies, the WCIRB regularly sponsors public seminars on classification and other rating issues for employers and members of the insurance industry.

ORDER

1. The determination of the SCIF to assign classification codes 8018 (stores – wholesale); 7219 (truckmen), 6218/6220 (excavation) and 4511 (analytical or testing laboratories) to AFFS’s 1999 and 2000 policies effective October 1, is sustained.
2. The SCIF shall apply classification code codes 8018 (stores – wholesale); 7219 (truckmen), 6218/6220 (excavation) and 4511 (analytical or testing laboratories) to AFFS’s operations for the 1999 and 2000 policy years.

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

Dated: April 6, 2004.

MARJORIE A. RASMUSSEN
Administrative Law Judge
California Department of Insurance