DEPARTMENT OF INSURANCE
ADMINISTRATIVE LAW BUREAU
45 Fremont Street
San Francisco, CA 94105
Telephone: (415) 904-5938

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BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of C & W TRUCK AND EQUIPMENT COMPANY, Appellant, From a Decision of THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA, Respondent.	FILE NO. ALB-WCA-93-9

DECISION

C & W Truck and Equipment Company, Inc., (C & W or "company") appeals a decision of the Workers' Compensation Insurance Rating Bureau (Rating Bureau).[1]

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[1] The Rating Bureau is a licensed rating organization within the meaning of Insurance Code section 11750.1. It serves as the Insurance Commissioner's designated statistical agent under Insurance Code section 11751.5. This appeal from a decision of the Rating Bureau, and the Commissioner's authority to determine the matters here presented are authorized by Insurance Code section 11753.1.

Appellant is represented by Richard A. Dongell, Esq., and Tal Clifton Finney, Esq., of the law firm Radcliff, Rose & Frandsen.

Respondent is represented by John N. Frye, Esq., and E. Lynn Malchow, Esq., of the law firm Frye & Alberts.

The parties stipulated that this appeal may be determined without an evidentiary hearing and they have submitted the matter for decision. The findings and determinations contained in this decision are based upon the following documents filed by the parties:

- Appellant's brief and attached exhibits;
- Respondent's brief;
- Record on Appeal Before the Department of Insurance (Cited as "Record"), submitted by respondent.

This decision is also based on the statutes and Department of Insurance regulations cited in the parties' briefs and of which we take official notice under Evidence Code section 451, subdivisions (a) and (b).

SUMMARY OF DECISION

C & W challenges the Rating Bureau's calculation of the experience modification applicable to the company's workers' compensation insurance policy effective May 1, 1993. The action challenged by C & W is described in the Rating Bureau's Classification and Rating Committee minutes of appellant's August

10, 1993, hearing before the committee. (Record, at pp. 13 - 14.)

C & W's appeal raises the issue whether the California Workers' Compensation Experience Rating Plan (hereafter referred to as the "Rating Plan" or "Plan") requires exclusion of loss and payroll data from the experience modification calculation where the data comprises experience developed under a policy which incepted outside of the experience period prescribed by the Rating Plan.[2] For reasons set forth below, we conclude the Plan required the Rating Bureau to exclude the data in question from C & W's May 1, 1993, experience modification calculation. We therefore affirm the Rating Bureau's decision.

FINDINGS OF FACT

C & W and Experience Rating

C & W employs between 25 to 30 people annually in its tank truck service and repair business. C & W's total payroll amount qualifies the company's worker's compensation premium for experience rating under the Rating Plan (Plan, Sec. I, para. (5)) and therefore its insured operations must be rated in accordance with the Plan (Plan, Sec. I, paras. (1) and (5)). "Experience

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[2] The Plan is promulgated as part of the Insurance Commissioner's regulations (Cal. Code Regs., tit. 10, § 2353). The revised version of the Plan effective January 1, 1993, governs the calculation of C&W's May 1, 1993, experience modification. (Plan, sec. I, para. (3).)

rating" is defined in the California Workers' Compensation Insurance Manual (Manual)[3] as follows:

> "The term "Experience Rating" shall mean that type of merit rating approved by the Insurance Commissioner under which previous years' loss experience of the particular employer is used to develop an experience modification to apply to the premium which has been computed using the Manual rates." (Manual, Sec. II, para. 17.)

The Rating Plan implements the workers' compensation merit rating system approved by the Insurance Commissioner pursuant to former Insurance Code section 11732.[4] (Manual, Sec. II, para. 17.) Under the Rating Plan, an experience modification is calculated based on the employer's loss and payroll experience over a three-year period. (Plan, sec. III, para. (2).) The three-year experience period commences four years and nine months prior to the experience modification date and terminates one year and nine months prior to the experience modification date. (*Ibid.*)

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[3] The Manual is promulgated as part of the Insurance Commissioner's regulations, at title 10, California Code of Regulations, section 2350.

[4] Former Insurance Code section 11732, the merit rating plan enabling statute, was repealed effective January 1, 1995, and reenacted as part of Insurance Code section 11734, operative January 1, 1995. The former section, in effect when the Rating Bureau determined C & W's May 1, 1993, experience modification, provided in part: "[The Insurance Commissioner] may ... approve a system of merit rating. Such ... system shall be uniform as to all insurers affected." (Former Ins. Code, § 11732.)

Section III, paragraph (3), of the Plan provides that the employer's experience developed under any workers' compensation insurance policy which incepts within the 3-year experience period shall be used in determining the employer's experience modification. That provision of the Plan limits the experience which can be used to that developed under completed policy periods.[5]

The experience period for calculating C & W's experience modification applicable to the policy effective May 1, 1993,

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[5] In relevant part, Section III, paragraphs (1), (2) and (3), of the Plan provide as follows:

SECTION III - ELIGIBILITY IN EXPERIENCE PERIOD

> "(1) **Eligibility Requirements for California Workers Compensation Insurance.** A risk shall qualify for rating its California Workers' Compensation Insurance premium under this Plan if it develops not less than $21,600 in premium by applying Manual Rates to the total remuneration that would be used in the rating calculation. Only completed policy periods shall be used in determining eligibility.
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> "(2) **Experience Period.** The experience period shall be three (3) years, commencing four (4) years and nine (9) months prior and terminating one (1) year and nine (9) months prior to the date for which an experience modification is to be established.
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> "(3) **Experience to be used for Rating California Workers' Compensation Insurance Risks.** The entire California Workers' Compensation Insurance experience of a risk (except as hereinafter provided) developed under any policy which provides coverage for all or a part of the risk's operations and which incepts within the experience period shall be reported and used in determining its experience modification. The experience of any such policy shall be used whether the operations covered by such policy are normal to the risk's business or otherwise. Only completed policy periods shall be used. . . ."

commenced August 1, 1988 (four years and nine months prior to the experience modification date). The experience period ended on August 1, 1991 (one year and nine months prior to the experience modification date).

The parties agree the Plan requires C & W's experience modification to be based on data developed under policies which incepted within the applicable three-year experience period. C & W does not dispute the Rating Bureau's use of the company's experience under policies incepting on May 1 of each of the years 1989, 1990 and 1991. The company contends, however, that its May, 1, 1993, experience modification should not be based only on experience under policies which incepted during the three-year period. Specifically, the company urges that its May 1, 1993, experience modification calculation should include data developed under a short term replacement policy effective from October 1, 1991, to May 1, 1992.

C & W's October 1, 1991, Replacement Policy

C & W's policy effective May 1, 1991, was a one-year renewal policy issued by Highlands Insurance Company (Highlands). During the policy term, Highlands informed C & W of its decision to discontinue writing insurance in Southern California and gave C & W notice the policy would be canceled as of October 1, 1991. Responding the cancellation notice, C & W purchased a short term policy from a different insurer, Golden Eagle Insurance, for the

period October 1, 1991 to May 1, 1992. C & W then resumed its May 1 anniversary rating date.[6]

In determining C & W's experience modification for May 1, 1993, the Rating Bureau used experience data developed under policies with the following effective dates:

May 1, 1989, to May 1, 1990

May 1, 1990, to May 1, 1991

May 1, 1991, to October 1, 1991.

The Rating Bureau did not consider the company's experience under the Golden Eagle policy based on the rationale the policy was a new policy and did not incept within the prescribed August 1, 1988, to August 1, 1991, experience period.

During the Golden Eagle policy term from October 1, 1991, to May 1, 1992, C & W enjoyed a favorable claims experience. C & W contends this favorable experience should have been included in the calculation of the May 1, 1993, experience modification, and advances the following arguments in support of its position.[7]

(1) C & W had no control over Highlands' cancellation of the policy which incepted on May 1, 1991. The insurer's

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[6] An employer's normal anniversary rating date is generally established by the effective date of the preceding workers' compensation policy. (Manual, Sec. VII, para. (2).) For a number of years C&W has maintained an anniversary rating date of May 1.

[7] The Rating Bureau calculated an experience modification of 239% for the policy commencing May 1, 1993, using data developed under policies effective during the period May 1, 1989, to October 1, 1991. The Rating Bureau does not dispute C&W's claim the experience modification would be significantly less if the base data were extended to include the company's favorable experience under the short-term Golden Eagle policy.

unilateral action unfairly results in a higher experience modification for C & W when the Plan is applied as written. The Plan's experience modification provisions should provide an exception for a replacement policy incepting outside the experience period where there has been an involuntary cancellation. To redress this unfairness, the Commissioner should amend the Plan, pursuant to his authority to correct errors or oversights under Insurance Code section 12929.

(2) The Plan does not define the phrases "incepts within the experience period" and "completed policies", contained in Section III, paragraph (3). These phrases are ambiguous when the Plan is applied to renewal, replacement, or new policies. The ambiguous phrases should be interpreted in a manner which effectuates the purpose of experience rating: : "[T]o permit the Rating Bureau to accurately and equitably determine the experience rating for a particular year of workers' compensation insurance coverage based on data which is thoroughly and accurately representative of that employers' operations risk." (C & W Brief, at pp. 16-17.)

(3) The short term Golden Eagle policy provided the same coverage and contained the same terms as the canceled Highlands policy. Thus, coverage under the Highlands policy which incepted May 1, 1991, was "completed" on May 1, 1992.

Insurance Code Section 12929

Insurance Code section 12929 authorizes the Commissioner to correct any record, finding, determination, order, rule, or regulation made by the Commissioner where (1) the correction furthers fairness, justice, and equity, and (2) the record, finding, determination, order, rule, or regulation would have included the correction except for mistake, clerical error, inadvertence, surprise, or excusable neglect.[8] Thus, the Commissioner's power to amend the Plan under section 12929 arguably lies only if the Plan, except for mistake or other

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[8] In relevant part, Insurance Code section 12929 provides:

"Irrespective of any provision in any law of this state the commissioner, pursuant to this code, has been and is authorized to correct: by amendment, by partial deletion or by partial addition, any record, finding, determination, order, rule or regulation made by him upon becoming satisfied that it is fair, just and equitable to make the correction and that any such record, finding, determination, order, rule or regulation would have included such correction except for mistake, clerical error, inadvertence, surprise or excusable neglect.

"Such correction shall only be made within a period of six months following the original action.

"When the facts are within the knowledge of the commissioner personally he may, upon his own motion and ex-parte, enter an order making any such correction.

"Otherwise, he shall enter such an order of correction only after receipt and consideration of a written petition of a person described in [Ins. Code] Section 12923 [viz., an actuary] or an employee of the Department of Insurance, accompanied in either case by a sworn affidavit of the facts constituting the mistake, clerical error, inadvertence, surprise or excusable neglect relied upon to justify the correction requested. In such case the order may be made ex parte...."

specified statutory ground, would have allowed experience modifications to be based on experience under replacement policies which incepted outside the three-year experience period.[9] On the present record, we find that neither logic nor fairness requires amendment of the Plan's limitation of experience modification data.

Section III of the Plan does not explicitly address replacement policies. Experience under such policies, however, is treated in the same manner as all other policy experience under the Plan's rating procedures. If a replacement policy incepts within the experience period, data developed under the policy qualifies for the experience modification calculation. If the policy incepts outside the experience period for a particular experience modification, the policy data will be used in determining future experience modifications. In the instant case, if C & W had purchased a replacement policy before August 1, 1991, data developed under the replacement policy would have qualified for determination of the May 1, 1993, experience

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[9] The Rating Bureau argues that Insurance Code section 12929 does not apply to the substantive changes to the Rating Plan advocated by C & W. That section, the Bureau contends, provides a remedy to rectify errors in actuarial statistics, quoting the provision that only an actuary or Department of Insurance employee may petition the Commissioner for a correction order under the statute. (Rating Bureau Brief, at p. 15.) Since we find the Plan provisions limiting the experience modification base data were not adopted in error and do not otherwise require correction, we need not reach the question whether the statute authorizes correction of omissions or mistakes other than those pertaining to actuarial calculations or statistics.

modification.[10] Because the company did not place coverage with Golden Eagle until after the experience period terminated, C & W's experience under that policy will be used for future experience modifications. Under the Plan's rating scheme, C & W will not loose the favorable experience.

C & W's claim of unfairness is not persuasive. We agree with the Rating Bureau that fairness of the experience rating system requires the Plan to be applied uniformly, and as written, to all affected insured employers.

> "[T]he rules of the California Experience Rating Plan are mandatory. They have been promulgated by the Insurance Commissioner under a grant of legislative authority and after formal public hearings. They cannot be disregarded by the [Rating] Bureau; nor can

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[10] At C & W's August 10, 1993, hearing before the Rating Bureau's Classification and Rating Committee, the company's vice-president, Tim Inzana, stated Highlands Insurance Company, a few weeks after May 1, 1991, informed C & W of the insurer's decision to cancel C & W's policy effective October 1, 1991. (Record, at p. 13.) If this is the case, C & W had ample time to secure replacement coverage before August 1, 1991. A letter dated May 11, 1993, to the Insurance Commissioner from company president Eldon Walthall (C & W's Exh. A), asserts C & W was notified of the contemplated cancellation in September 1991. C & W's brief also states the company was given the cancellation notice in September 1991 but makes no reference to the statements made on behalf of the company at the August 10, 1993, hearing. We may presume that C & W possesses written evidence of the earliest cancellation notice it received. As the company did not produce such evidence or explain the discrepancy in the evidence relating to the notice date, we are entitled to find the company knew before August 1, 1991, that Highlands intended to cancel the policy. While this point is not essential to the decision, it reveals that the company had the opportunity to extend the period of qualifying experience for the May 1, 1993, experience modification.

they be rewritten or revised by the Commissioner here, sitting in his adjudicatory capacity, to suit the desire of a single employer for a more favorable experience modification and a lower workers' compensation insurance premium. [Footnote omitted.] The Plan itself advises that its rules '<u>shall govern</u> the experience rating procedure to be followed in connection with California Workers' Compensation Insurance.' [Plan, Sec. I, para. (1).] Put another way, the rules are not discretionary and they are applied by the Bureau across the board to all employers who have experience modifications. And they are applied whether this results in a credit experience modification (and a lower insurance premium) or a debit experience modification (and a higher insurance premium)." (Rating Bureau brief, at pp. 2-3; emphasis in original.)

We find the provisions of Section III, paragraphs (2) and (3) of the Plan, prescribing the experience modification experience period and defining qualifying experience, are a reasonable and consistent part of the overall experience rating procedure established in the Plan. Moreover, these provisions implement fairly the goals of experience rating under the Plan: "[To] provide adequate incentives for loss prevention, and ... provide for sufficient premium differentials so as to encourage

safety." (Ins. Code, § 11736.) We further find the Rating Bureau applied the Plan correctly and fairly in determining C & W's May 1, 1993, experience modification.

C & W's Claim of Ambiguity

C & W argues the phrases contained in Section III, paragraph (3), of the Plan, "incepts within the experience period" and "completed policies" are ambiguous when applies to renewal, replacement, and new policies. We disagree and find no ambiguity in these phrases when paragraphs (2) and (3) are read in their entirety.

Section III, paragraph (2) establishes the three-year experience period. For C & W's May 1, 1993, experience modification the experience period commenced August 1, 1988, and terminated August 1, 1991. Paragraph (3) provides that only experience under policies which incept within the experience period shall be used in determining the experience modification.

C & W was covered by three workers' compensation policies which incepted during the experience period August 1, 1988, to August 1, 1991. The inception dates were May 1, 1989, May 1, 1990, and May 1, 1991. The last of these policies, the Highlands policy, terminated on October 1, 1991, as a result of the insurer's cancellation. Following the mandatory provisions of the Plan, the Rating Bureau properly calculated C & W's May 1, 1993, experience modification based on the company's experience

during the period from May 1, 1989, to October 1, 1991. The Golden Eagle policy which provided coverage from October 1, 1991, constituted a new policy which incepted outside the experience period. The Rating Bureau therefore correctly excluded experience under that policy from the May 1, 1993, experience modification calculation.

Completion Date of Canceled Highlands Policy

C & W contends the Highlands policy that was canceled effective October 1, 1991, was "completed" within the meaning of the Rating Plan on May 1, 1992. This contention is based on the argument the Golden Eagle policy that incepted on October 1, 1991, was a continuation of the canceled Highlands policy. We find such a construction ignores the uncontroverted facts and conflicts with the plain meaning of the language used in Section III, paragraph (3) of the Plan. Giving the words used in paragraph (3) their ordinary meaning, the Highlands policy term was clearly completed upon its cancellation on October 1, 1991. Just as clearly, the Golden Eagle policy incepted[11] on October 1, 1991.

[11] The Plan uses the term "incepted" in its ordinary meaning, "began". (See, e.g., Webster's New World Dict. (3d college ed. 1988) p. 682.)

DETERMINATION OF ISSUES

Section III, paragraphs (2) and (3) of the Rating Plan require exclusion of C & W's experience developed under the Golden Eagle policy which incepted on October 1, 1991, in the determination of the May 1, 1993, experience modification. C & W will not, however, loose the experience under that policy as it will be used to determine future experience modifications.

ORDER

1. The decision of the Workers' Compensation Rating Bureau is affirmed.

2. This Decision and Order shall be effective 20 days from the date hereof, pursuant to Insurance Code section 11754.5.

DATED: January 11, 1994

MICHAEL D. JACOBS
Administrative Law Judge
California Department of Insurance