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

In the Matter of the Appeal of)
)
JUST LIKE HOME,)
)
Appellant,) **FILE AHB-WCA-03-13**
)
From the Decision of the)
)
WORKERS' COMPENSATION INSURANCE)
RATING BUREAU,)
)
Respondent.)
_____)

PROPOSED DECISION

Introduction

The dispute underlying this appeal arises over the rates charged for Just Like Home's (Just Like Home or Appellant) workers' compensation insurance policy, Number 1618701-02, issued by State Compensation Insurance Fund (SCIF), for the 2002¹ policy year. The rates charged by SCIF were based in part on the experience modifications²

¹ The 2002 version of the Experience Rating Plan has been used because it is Appellant's August 1, 2002 workers' compensation insurance experience modification that is at issue here.

² Experience rating is mandatory under the provisions of the Plan and assesses whether a business's claims are greater or less than average by comparing its payroll and claims history with other California businesses

assigned to Appellant by SCIF and the Workers' Compensation Insurance Rating Bureau of California³ (Respondent or the WCIRB), pursuant to the California Workers' Compensation Experience Rating Plan⁴ (ERP).

Appellant brings this appeal under Insurance Code section 11753.1.⁵ The appeal is from a January 14, 2003 decision of the WCIRB to apply the past experience of Appellant's predecessor in calculating Appellant's experience modification pursuant to the "Change in Status" and the "Change in Ownership" rules of the ERP. Additionally, Appellant disputes the time period used for the calculation of the experience modification. For the reasons that follow, the WCIRB's decision is affirmed.

Issue Statements

Under Section IV, Rule 1—"Change in Status" and Section IV, Rule 1 (a)—"Change in Ownership" of the ERP, was the WCIRB correct in assigning Appellant's predecessor company's experience modification to Appellant for its 2002 workers' compensation insurance policy?

Is the calculation of Appellant's experience modification correct when the WCIRB used only experience from policies that had both incepted within the experience

in the same industry. An employer's premium may be adjusted up or down depending on its experience modification.

³ The WCIRB 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 rating systems. The WCIRB serves as the Commissioner's designated statistical agent for the purpose of gathering and compiling experience data developed under California workers' compensation and employers' liability insurance policies. (Ins. Code §11751.5.)

⁴ The California Workers' Compensation Experience Rating Plan is approved by the Commissioner under a grant of legislative authority. (Ins. Code §11734 (a).) The ERP itself acknowledges this and provides further that the rules "govern the experience rating procedure to be followed in accordance with California workers' compensation insurance." (ERP, Section I, Rule 1.)

⁵ Section 11753.1, subdivision (a), authorizes any person aggrieved by a rating organization's decision to appeal the decision to the Insurance Commissioner.

period and for which the complete policy period had terminated prior to the reporting date?

Procedural History

On February 13, 2003, Appellant initiated these proceedings by filing a written appeal with the Insurance Commissioner of the WCIRB's January 14, 2003 decision. California Department of Insurance Administrative Law Judge Lisa A. Williams conducted a live evidentiary hearing in this matter on May 28, 2003.

The parties filed written briefs and Joint Exhibits 1 through 31 (Bates Stamp Numbers 1 through 102) prior to the hearing. On May 27, 2003, Appellant submitted Exhibits 32 through 34 (which were not Bate Stamped) as additional Joint Exhibits. At the evidentiary hearing, Respondent requested that Exhibit 35 (which was not Bate Stamped) be admitted as an additional Joint Exhibit. All of the Exhibits were admitted as Joint Exhibits except Exhibits 20, 32, 33, 34 and the redacted portion of Exhibit 19. The admitted Joint Exhibits and the testimonial evidence given at the hearing comprise the record evidence in this matter.

Russell Kuhn appeared as counsel for Appellant. Pamela Meak-Voss, one of the owners of Just Like Home, appeared and testified on Appellant's behalf. David Voss, Pamela's husband and the other owner of Just Like Home, also appeared but did not testify.

John N. Frye appeared as counsel for Respondent the WCIRB. Eric Riley, WCIRB Manager of the Policy Examination Department, appeared and testified as an expert witness on Respondent's behalf. The record remained open until June 13, 2003, when the case was submitted and the record closed.

Parties' Contentions

Appellant contends that for worker's compensation insurance experience modification purposes, the experience of its predecessor, In-Home Care Providers, should not be applied as Appellant's experience. This contention is based on Appellant's belief that the administrative changes in Just Like Home's management under the Voss' new ownership and direction constituted a material change in operations under the Change in Status Rule of the ERP, Section IV, Rule 1, Subsection b. Additionally, Appellant contends that the WCIRB did not properly calculate Appellant's experience modification.

The WCIRB contends that Appellant's predecessor's experience does apply as Appellant's experience for worker's compensation insurance experience modification purposes pursuant to Section IV, the Change in Status and Ownership Rules of the ERP, and that Appellant's experience modification was properly calculated pursuant to Section III, Rules 2 and 3, of the ERP.

FINDINGS OF FACT

Terri Faulkner was the owner of an in-home care service doing business under the name "In-Home Care Providers" (Joint Exhibit (JE) 7). Pamela Meak-Voss started working for Faulkner at In-Home Care Providers in September 1999 (Hearing Transcript (HT), 27:18-25, 28, 29:1-4; JE 21, Bate Stamp No. 52). Faulkner retired due to illness, and on October 16, 2000, Pamela and David Voss entered into an agreement with Faulkner to purchase the majority of the assets of Faulkner's in-home care business, In-Home Care Providers (JE 7, 13). The purchase agreement provided that Faulkner would cease providing client services and cease the use of the trade name In-Home Care Providers on December 31, 2000 (JE 7). The Voss' Just Like Home operation began

doing business on January 1, 2001 (HT, 21:21-25, 22:1-2; JE 22, Bate Stamp No. 56).

It is undisputed between the parties that there was a material change in ownership when Just Like Home purchased the majority of the assets of In-Home Care Providers. It is also undisputed between the parties that there was no material change in employees when Just Like Home commenced its business because Just Like Home employed over 50% of the employees that had previously been employed by In-Home Care Providers within the first ninety days after Just Like Home commenced doing business (JE 17, 24, Bate Stamp No. 68). At the end of Appellant's first quarter business operation, 72% of Appellant's employees were composed of former In-Home Care Providers' employees (JE 17, 24, Bate Stamp No. 68).

After Just Like Home commenced doing business, Ms. Meak-Voss instituted new methods of treatment and training of the employees that differed from those that had been employed by Ms. Faulkner, and she instituted new rules that helped to reduce the number of employee injury claims (HT, 30:15-25, 31-36, 37:1-3, 38:1-9). However, the nature of Appellant's business did not change; it remained an in-home care service provider, and it was not assigned a new classification code by the WCIRB (HT, 50:12-25, 51:1-2, 54:2-25, 55:1-14). After Just Like Home purchased the assets of In-Home Care Provider, Just Like Home's operations continued to be assigned to Classification Code 8827, "Homemaker Services" (JE 1, 2, 3, 31).

On October 29, 2002, Mr. Kuhn, Appellant's counsel, contacted the WCIRB to inquire about an increase in Appellant's experience modification rating from 120% to 185% (JE 8). On November 4, 2002, Mr. Riley of the WCIRB responded to the inquiry. Thereafter, numerous written communications took place between the parties, including

an explanation of how Appellant's 2002 experience modification was calculated.

The applicable experience period begins November 1, 1997 and runs to November 1, 2000.⁶ The insured had two policies with 2000-year inception dates (08/01/00 to 9/30/00 and 9/30/00 to 01/01/01), representing 5 months' worth of coverage. This is why the year 2000 payroll indicated on the Experience Rate Sheet for the 2002 experience modification is less than other years (JE 3). Conversely, for the August 2003 ex-mod, the insured will have two policies with year 2001 inception dates (01/01/01 to 08/01/01 and 08/01/01 to 08/01/02), representing 19 months' worth of coverage.

In administering the rules of the Experience Rating Plan regarding data relevant to the calculation of the experience modification, the WCIRB applies the Uniform Statistical Reporting Plan (USRP) with respect to how the data is received and the frequency requirements on reporting data to the WCIRB (HT, 61:22-25, 62, 63:1-2). Here, Appellant's 2002 experience period included less than 36 months' data because Appellant did not have 36 months' worth of usable data from which to calculate the 2002 experience modification (HT, 69:2-25, 70-72, 73:1-13; JE 35, Bate Stamp Nos. 106-107). Only 5 months of the 2000 payroll was congruent with the policies incepted within the experience period.

On January 14, 2003, the WCIRB issued a final decision to apply the past experience of In-Home Care Providers in calculating Appellant's experience modification for workers' compensation insurance experience rating purposes, pursuant to the "Change in Status Rule" and the "Change in Ownership Rule" of the ERP (JE 23).

⁶ See Section III, Rule 2 of the ERP for the definition of the 3 year experience period: "The experience period shall be three (3) years, commencing four (4) years and nine (9) months prior and terminating one

LEGAL ANALYSIS

The Insurance Commissioner's Regulations

The legislative goals of experience rating are expressed in California Insurance Code section 11736, which became effective January 1, 1995. Insurance Code section 11736 provides:

An experience rating plan shall contain reasonable eligibility standards, provide adequate incentives for loss prevention, and shall provide for sufficient premium differentials, so as to encourage safety.

The California Legislature has declared that compliance with the experience rating plan is mandatory. "Every workers' compensation insurer shall adhere to a uniform experience rating plan filed with the commissioner by a rating organization designated by the commissioner and subject to his or her disapproval." (California Insurance Code §11734 (a).)

The provisions of the California Workers' Compensation Experience Rating Plan are part of the Insurance Commissioner's regulations, at title 10, California Code of Regulations, section 2353.1. The WCIRB, as the rating organization designated by the commissioner, must develop experience modifications in the manner prescribed in the regulations. The Experience Rating Plan is defined, as used in these regulations, as the Workers' Compensation Rating Plan approved by the Insurance Commissioner of the State of California. (ERP, Part I, Section II, Paragraph 4.) These regulations have a binding effect equal to the force of legislative enactments. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 6 Cal.3d 392, 401.)

Change in Status

The rules governing change in status and combination of entities based on

(1) year and nine (9) months prior to the date for which an experience modification is to be established."

ownership are set forth in the ERP. With respect to change in status based on change in ownership, the ERP provides in pertinent part:

Rule 1. Change in Status (Ownership, Operations and Employees).

The following rules govern the use of past experience in future experience ratings whenever a change in ownership, management, control, operations or employees occurs. *Experience of the past shall be used in future experience ratings unless a material change in ownership, as specified in paragraph a, is accompanied by a material change in operations or employees as specified in paragraph b.* (Emphasis added).

(ERP, Section IV, Rule 1.)

Rule 1 specifically states that whenever there is a change in ownership, management, control, operations or employees, experience of the past **shall** be used in future experience ratings **unless a material change in ownership is accompanied by a material change in operations** or employees.⁷

Change in Ownership

The rules governing a material change in status resulting from the purchase of a business' assets, such as occurred here, are set forth in the Experience Rating Plan.

Where the majority of the assets of one business have been purchased by another, for the purpose of experience rating, a determination must be made first as to whether a change in ownership occurred.

The parties do not dispute that a change in ownership occurred when Appellant purchased the majority of the assets of In-Home Care Providers. (ERP, Section III, Rule 4, (b) and (d).)

No Change In Employees

The parties do not dispute that there was no material change in employees after

⁷ Although in its initial appeal, Appellant contended that it had accomplished a material change in employees when the change in ownership occurred, Appellant has since dropped that claim from its appeal (HT, 53:9-25, 54:1-9; JE 19; Appellant's Pre-Hearing and Reply Briefs).

Appellant purchased In-Home Care Providers' assets. Appellant admits that it employed over 50% of In-Home Care Providers' employees within the first ninety days after Appellant commenced doing business.

No Change In Operations

Appellant argues that when the Vosses became the new owners and started Just Like Home, that change in ownership was accompanied by a material change in operations because Pamela Meak-Voss instituted administrative changes and improvements in Just Like Home's management by improving safety rules and treatment of staff. Appellant claims that these changes reduced Appellant's incidence of employee workers' compensation insurance injury claims, thereby accomplishing a material change in operations resulting in a material change in status under the Change in Status Rule of the ERP. However, Appellant's contention that these changes created a material change in status under Rule 1 is erroneous and ignores the definition of a material change in operations set forth in Rule 1 of the ERP.

A material change in operations is defined in the ERP, in pertinent part, as:

A change in operations is material *only if*:

*(a) the operations (which underwent the material change in ownership) were changed, during the first ninety (90) days following the material change in ownership, to such an extent that the process and the hazard to which the employees (who conduct such operations) are exposed differ substantially from the process and the hazard to which they were exposed prior to the material change in ownership, **and**,*

(b) the change in operations results in a reclassification of the operations by the Bureau. (Emphasis added).

(ERP, Section IV, Rule 1, Paragraph b, Subsections (1)(a) and (1)(b).)

Even if management changes, past experience still applies where there is a material change in ownership but no change in operations such that process and hazard

are so different that the operations are reclassified. Management and operations are not one and the same.

The term “management” is not defined in the ERP. As a result, Appellant contends that Appellant can establish its definition, and Appellant’s definition is that “administrative changes in a businesses’ management and improvements in the facility constitute a material change in operations.” Appellant’s argument fails because Rule 1 and its subsections, (b)(1) and (b)(2), are clear. These rules require that the objective criteria of ownership, operations and employees, which are all defined, must be used to determine the application of past experience to a material change in ownership. Therefore, even if the “management” of a facility changes, experience of the past shall still apply. It is only if there is both a material change in ownership and a material change in operations (as defined) that past experience does not apply.

Here, despite administrative changes and training, process and hazard did not change to such an extent that the WCIRB reclassified the operations. It is still an in-home care provider. The necessary prerequisites for a “material change in operations” have not been met.

The fact that the Vosses made improvements in the new facility and in the treatment of their employees is commendable, and if these improvements continue, they will benefit from their efforts in the near future as their experience modification decreases in response to fewer employee injury claims. However, these types of changes do not constitute a material change in operations under the ERP. The governing factor for this purpose is the type of process and hazard, not the frequency of process and hazard.

In sum, Just Like Home did not meet either of the requirements of Section IV, Rule 1, Paragraph b, Subsections (1)(a) or (1)(b) of ERP, for a material change in operations when the Vosses commenced doing business as Just Like Home on January 1, 2001. Accordingly, the WCIRB correctly applied In-Home Care Provider's past experience under Faulkner's ownership to Appellant's experience under the Voss' ownership.

Experience Modification Calculation

Appellant relies on the definition of experience rating found in the California Insurance Code section 1730 (c), in support of its contention that the WCIRB incorrectly calculated its experience modification rating because the WCIRB used 29 months' data instead of 36 months' data in calculating Appellant's experience modification. Appellant is incorrect in this assertion.

Insurance Code section 1730 (c) states: "Experience rating' means a rating procedure *utilizing past insurance experience of the individual policyholder* to forecast future losses" (Emphasis added). This definition however, cannot be read in isolation. Appellant's reliance on this code section in isolation ignores the requirements of Section III, Rules 2 and 3, of the ERP.

The ERP advises that its rules shall govern the experience rating procedure to be followed in connection with California workers' compensation insurance. (ERP, Section I, Rule 1.) The rules of the ERP are mandatory and must be applied equally to all employers. The rules have been promulgated by the Insurance Commissioner under a grant of legislative authority and after formal public hearings. They have the same force and effect as statutes (*Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal. 4th

1). The rules cannot be disregarded by the WCIRB, nor can they be rewritten or revised by the Commissioner sitting in his adjudicatory capacity.

Section III, “Eligibility and Experience Period,” Rule 2, “Experience Period,” defines the experience period as follows:

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.

Section III, Rule 2 generally establishes a 3 year or 36 month period of time of losses and payroll from which to calculate an experience modification. However, there are exceptions to this general rule. Section III, “Eligibility and Experience Period,” Rule 3, “Experience to be Used for Rating California Workers’ Compensation Insurance Risks,” further defines the experience that must be used to calculate an experience modification, as follows:

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 California workers’ compensation insurance coverage for all or a part of the risk’s operations **and which incept 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.** (Emphasis added).

In C & W Truck and Equipment Co., File No. ALB-WCA-93-9 (DOI Precedential Decision, effective January 11, 1994), the Commissioner included the experience of all policies incepting in the experience period but not the experience of a policy replacing or continuing a policy that incepted during the period that was cancelled before its normal termination date, because the new policy incepted outside the period.

The same situation obtains here. Therefore, the WCIRB correctly utilized the 9/30/00 to 01/01/01 policy experience (5 months of losses and 5 months of payroll), but not the experience from the follow-on 01/01/01 policy. The follow-on policy inception outside the experience period.

Furthermore, Part 4, Paragraph A, Section I, Rules 3 and 4, of the Uniform Statistical Reporting Plan (USRP) define the time limitations for valuing and filing unit statistical reports.

Part 4, Paragraph A, Section I, Rule 3, Subsection (a), states in pertinent part:

Date of Valuation. The date of valuation shall be determined as follows:

- (a) **First Reports.** Losses included in the first reporting of a given policy year shall be valued as of eighteen (18) months after the month of the inception date of the policy.
(Part 4, Paragraph A, Section I, Rule 3, Subsection (a).)

Part 4, Paragraph A, Section I, Rule 4, Subsection (a), states in pertinent part:

Date of Filing. The date of filing shall be determined as follows:

- (a) **First Reports.** First reports are due in the Bureau not later than twenty (20) months after the effective date of the policy.
(Part 4, Paragraph A, Section I, Rule 4, Subsection (a).)

Rules 3 and 4 of the USRP require that the first level unit statistical report for a policy be valued at 18 months after policy inception and be filed with the WCIRB 20 months after policy inception (ERP, Part 4, Paragraph A, Section I, Rules 3 and 4). Thus, the unit statistical report data for a January 2001 policy is not due to the WCIRB until September 2003. As a result, the WCIRB cannot include data from a January 1, 2001 policy in an August 1, 2002 experience modification, since this data would not have been received in the WCIRB until after August 1, 2002.⁸

⁸ The experience period ends at 1 year and 9 months before the modification effective date in order to allow time for a payroll audit, claims evaluations, and data submission.

The necessity of setting a termination date for the experience period upon which an experience modification is based goes beyond administrative convenience. It would be simply impossible to get reliable data that immediately precedes the effective date of the experience modification. Appellant's contention that the statute must be so construed is rejected. Appellant will receive the benefit of improved experience in future experience modifications, calculated according to the same rules.

DETERMINATION OF ISSUES

Based on all of the above, under the Change in Status Rules of the ERP, the WCIRB was correct in its determination that Appellant Just Like Home's predecessor underwent a material change in ownership but not a material change in status or operations when Just Like Home began doing business on January 1, 2001. Further, the WCIRB correctly calculated Just Like Home's experience modification under the requirements of Section III, Rules 2 and 3, of the ERP.

ORDER

The decisions of the Workers' Compensation Insurance Rating Bureau are affirmed.

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: June 25, 2003

LISA A. WILLIAMS
Administrative Law Judge
Department of Insurance