

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE DIRECTOR OF THE DIVISION OF INSURANCE**

In the Matter of)	
)	
GENERAL MECHANICAL)	OAH No. 06-0146-INS
_____)	Agency Case No. H 06-01

DECISION AND ORDER

I. Introduction

General Mechanical (“GM”) appeals under AS 21.39.090¹ a decision of the Alaska Workers’ Compensation Grievance Committee (“Grievance Committee”) to deny it a Contracting Classification Premium Adjustment Program (“CCPAP”) discount for work performed under classification code 5536 in connection with its 2005 workers’ compensation insurance policy.

This case turns on whether the omission of code 5536 from a list of codes eligible for a premium discount was a clerical error or a deliberate choice. Only the Division of Insurance staff and GM through its broker, David Eckroth, have participated actively in the appeal. The National Council on Compensation Insurance, Inc. (“NCCI”) has provided limited comments essentially in an *amicus* role, and GM’s insurer, SeaBright Insurance Company, has simply indicated its willingness to abide by the outcome.

The parties agreed at the outset of the appeal that they envisioned no factual disputes and that the case could likely be resolved by motion. Full briefing and an exchange of documentary evidence have shown that code 5536’s omission from the table of eligible codes was inadvertent, and that GM is entitled to summary adjudication.

II. Material Facts and Background

A. CCPAP Premium Relief

In Alaska, workers’ compensation insurance premiums are based on a system managed by NCCI. NCCI lists 800 different codes or classifications that are designed to group employers with similar risk characteristics. An employer’s estimated premium is determined by multiplying the anticipated annual payroll of the business by the rate for the code to which a business is assigned. A business may have several codes apply to its operations.

¹ Because of the operation of AS 21.06.240, the hearing procedures in AS 21.06 do not apply to an AS 21.39.090 appeal. The provisions of AS 21.39.090 itself and AS 21.39.170(b) and (c) are applicable.

The legislature has seen fit to provide “premium relief” to the construction industry in recognition of the often higher payroll associated with construction work: “Notwithstanding any other provision of this chapter, a rate filing for workers’ compensation insurance that classifies a risk in the construction industry may not contain or impose a higher premium rate if the risk upon which the higher rate filing is based consists only of a higher wage rate paid by the employer.”² Since January 1, 1996 NCCI has relied upon its CCPAP discount program to ensure it complies with AS 21.39.045.³ The CCPAP discount is a percentage decrease given to employers whose policies contain contracting classification codes. NCCI refers to “construction” as “contracting.” As used in this decision, these terms are interchangeable.

The CCPAP discount is tied to the hourly rate of the employees covered by these codes, regardless of the individual code assigned to the work. For example, an hourly wage of \$20.50 – \$20.99 receives a 1% credit; an hourly wage of \$25.00 to \$25.49 receives a 10% credit. To qualify, a policy must have more than 50% of the premium attributable to one or more contracting classifications.

Alaska adopted code 5536 in 1997 as a “new, separate and distinct classification for the fabrication and installation of heating and air conditioning duct work.”⁴ NCCI classifies code 5536 as a contracting code in its publications and—notably—in documents submitted to the division with its rate filing.⁵ For reasons not apparent in the record, code 5536 was never added to the table of CCPAP-eligible contracting codes submitted by NCCI and approved by the division. GM argues that because the approved rate filing identified code 5536 as a contracting code, it must be on the list of CCPAP-eligible codes for the rate filing to comply with AS 21.39.045(a).

In early 2004 Mr. Eckroth contacted NCCI regarding the classification status of code 5536.⁶ Clay Stephens, an employee of NCCI, responded: “To answer your question, classification code 5536 has not been updated in the CCPAP program; therefore it is not recognized as a construction code. You and I both know it is, but until the program is updated . . . code 5536 will not register as a construction code.”⁷ In late 2004, NCCI proposed

² AS 21.39.045(a).

³ Division Motion to Affirm (“Division”) Exhibit 6.

⁴ Division Exhibit 7 at 1.

⁵ See, e.g., GM Exhibit 2 at 2 (NCCI Scopes Manual Issued January 2004 at 204 (Code 5536 identified as a “construction classification” applicable in Alaska.)); GM Exhibit 3 (NCCI loss classification experience filed with NCCI’s rate filing effective January 1, 2004, identifying Code 5536 as falling under the industry group “contracting”).

⁶ GM Exhibit 1.

⁷ *Id.*

that Alaska replace code 5536 with 5537, a change that was subsequently approved with a 2006 effective date.⁸ NCCI did not initially request that code 5537 be on the list of CCPAP-eligible codes, but the organization subsequently recognized this as an error and corrected it in an August 2005 filing.⁹

GM obtained a workers' compensation policy from SeaBright Insurance Company for the period December 31, 2004 to December 31, 2005.¹⁰ SeaBright calculated GM's monthly premiums using code 5536, "Air Conditioning Duct Fabrication And Installation & Drivers,"¹¹ but made no determination about CCPAP eligibility.¹² Over 50% of GM's premium for the time in question is attributable to code 5536.¹³ NCCI denied the CCPAP discount, indicating that in Alaska code 5536 is not CCPAP-eligible.¹⁴

B. Grievance Committee and Appeal Proceedings

GM requested a hearing before the Grievance Committee asking that it review NCCI's denial of GM's CCPAP credit for its 2005 policy, correct the omission of code 5536 from the list of eligible construction codes in Alaska effective on January 1, 2004, and recalculate the CCPAP factor for GM to include code 5536. The Grievance Committee considered GM's request on January 19, 2006. A motion to grant the request failed.

GM appealed the Grievance Committee's decision to the Director of the Division of Insurance. GM cited technical errors in the Grievance Committee's decision and argued that unless changed, new contractors and out-of-state contractors will have an advantage over established Alaskan contractors such as GM when bidding a contract. On May 8, 2006, the Division of Insurance filed a Motion to Affirm Grievance Committee Decision. GM did not respond to the division's motion. A proposed decision was presented to the parties and the Director. GM filed a Proposal for Action requesting that additional information and argument be considered before the Director issued her decision. Upon consideration of the Proposal for Action, the Director remanded the matter with instructions to consider the arguments and evidence presented with GM's Proposal for Action. The Proposal for Action was treated as GM's opposition to the division's May 8, 2006 motion. The division was given an opportunity,

⁸ Division Exhibit 9 at 1-2.

⁹ Division Exhibit 10 at 1.

¹⁰ Division Exhibit 1 at 1.

¹¹ *Id.* at 2.

¹² *Id.* at 10.

¹³ *Id.* at 2.

¹⁴ Division Exhibit 2.

which it utilized, to respond to the Proposal for Action, and the case again became ripe for consideration on October 30, 2006.

III. Discussion

A. Summary Adjudication

This matter has been presented for decision through a motion for summary adjudication. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.¹⁵ It is a means of resolving disputes without hearing where the central underlying facts themselves are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing is not required.¹⁶ As the Alaska Supreme Court has observed, “one need not hold a hearing if there is nothing to hold a hearing about; or, more precisely, ‘there is no requirement . . . that there be a hearing in the absence of substantial and material issues crucial to (the) determination.’”¹⁷

When the available facts and issues are fully developed in the briefing of one party’s motion for summary judgment, a court (and, by extension, an administrative body applying the standard for summary adjudication) may grant summary disposition to the *nonmoving* party, if the papers show that that party is entitled to prevail.¹⁸ Here, the available facts show that GM is entitled to summary disposition.

B. The Parties’ Contentions

GM relies upon documents prepared by NCCI, issued January 2004, all of which classify code 5536 as a code within the contracting industry group applicable in Alaska.¹⁹ One document, the loss classification experience filing, is part of the rate filing filed with the division. The loss classification experience addressing code 5536 identifies it as a contracting code.²⁰ Therefore, GM concludes that it must be a clerical oversight that omitted code 5536 from the CCPAP-eligible codes.

¹⁵ See, e.g., *Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

¹⁶ See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

¹⁷ *Miner’s Estate v. Commercial Fisheries Entry Commission*, 635 P.2d 827, 834 (Alaska 1981) (citing *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir. 1967)).

¹⁸ E.g., *Dickeson v. Quarberg*, 844 F.2d 1435, 1444 n.8 (10th Cir. 1988); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2720; see also *Rockstad v. Erikson*, 113 P.3d 1215, 1222 & n.19 (Alaska 2005).

¹⁹ See, e.g., GM Exhibits 2, 3, 4 at 14, and 8.

²⁰ GM Exhibit 4 at 14.

GM reasons that prior to adoption of code 5536, GM's work was classified as code 5538, Sheet Metal Work – Shop and Outside. Code 5538 has been a CCPAP-eligible code since the program's inception. When NCCI proposed code 5536, the introductory rate and rating values for code 5536 were equal to code 5538. NCCI's filing, urging adoption of code 5536 by the division, explained that establishing code 5536 would have "no impact on present premium levels but will assure the equitable treatment of risks installing heating and air conditioning duct work."²¹ GM argues that for there to be no impact on premium levels, "NCCI was required to have 5538's CCPAP eligibility carry forward to code 5536."²²

The division disagrees. It argues that there is nothing in the record to indicate that NCCI intended code 5336 to be a CCPAP-eligible code. The division reasons: "[t]he weight of the evidence shows NCCI's failure to award General Mechanical the CCPAP discount for code 5536 was not the result of an oversight. Unless NCCI provides evidence to the contrary, the record before this court cannot support any other conclusion."²³

C. Appropriate Handling of Code 5536

The Grievance Committee was correct when it concluded that NCCI cannot arbitrarily add or delete codes without approval from the Director of Insurance. The Grievance Committee has no independent authority and its decisions have no legal presumption of validity.²⁴ Following a hearing before the Grievance Committee, a party may appeal the action of the committee to the Director, who may affirm or reverse the action of the Grievance Committee.²⁵ The Director may consider new or additional evidence not presented to the Grievance Committee.

Here, GM filed with its Proposal for Action several NCCI documents that were not presented to the Grievance Committee. These NCCI documents classify code 5536 as a risk group occurring within the contracting industry. Therefore, GM argues, code 5536 is a construction code that, by statute, has to be CCPAP-eligible.²⁶

²¹ Division Exhibit 7 at 2; GM Exhibit 6 at 2.

²² GM Proposal for Action at 4.

²³ Division Reply at 3. The division raised several additional arguments in its briefing. These arguments were never developed. They include contentions that GM accepted the policy knowing it would not get the CCPAP discount and cannot now cry foul, and that GM has brought forth no evidence of discrimination. Even if they had been seriously pursued, these arguments do not raise any issue of material fact, nor do they establish that the decision of the Grievance Committee should be affirmed.

²⁴ *In re Borealis Broadcasting, Inc.*, Division of Insurance Case No. H99-01 at 2, 7.

²⁵ AS 21.39.090.

²⁶ GM Proposal for Action at 4.

GM's argument is persuasive. AS 21.39.045(a) requires that any rate filing classifying a risk in the construction industry may not have a higher premium if the higher premium is based upon the wage rate paid by the employer. NCCI's rate filing included a loss classification experience that identified code 5536 as a construction code. The identification as a construction code appeared in the documents submitted and prepared by NCCI as part of its rate filing. Accordingly, for the rate filing to comply with AS 21.39.045(a), code 5536 needed to be made CCPAP-eligible.

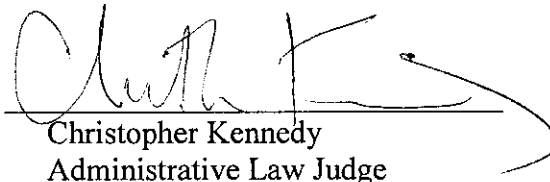
Since code 5536 had been identified as a contracting code at the time of the filing and its inclusion in the CCPAP-eligible list was necessary for the filing to comply with the governing statute, the natural inference is that its omission from that list was a clerical error. The division has presented no evidence to suggest otherwise. For this reason, based on the fuller record developed in the appeal process, the decision of the Grievance Committee must be reversed.

IV. Conclusion

The Decision of the Grievance Committee is reversed. If General Mechanical has more than 50% of premium attributable to one or more contracting classifications, including code 5536, it is entitled to the applicable CCPAP premium discount for its 2005 workers' compensation insurance policy.

DATED this 6th day of March, 2007.

By:


Christopher Kennedy
Administrative Law Judge

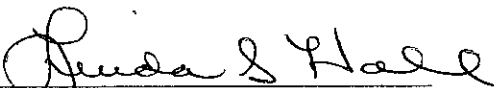
Adoption

The undersigned Director of the Division of Insurance adopts this Decision and Order in OAH Case No. 06-0146-INS as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 7th day of March, 2007.

By:


Linda S. Hall
Director, Division of Insurance