

STATE OF ALASKA
DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
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STATE OF ALASKA

DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

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IN THE MATTER OF)
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RISQ CONSULTING AND AVALON)
DEVELOPMENT)
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Case No. H 18-07

Proposed Decision

Introduction

On December 17, 2018, the Alaska Division of Insurance received a request for a hearing from Lee Bridgman of RISQ Consulting (RISQ) and Curt Freeman of Avalon Development Corporation (Avalon) appealing the Alaska Workers' Compensation Grievance Committee decision heard on November 6, 2018 regarding a dispute with the American Interstate Insurance Company (American Interstate Insurance). Avalon Development Corporation is primarily engaged in mineral exploration services and was insured in 2017 for worker's compensation purposes by American Interstate Insurance. The dispute concerns an interim audit performed by American Interstate Insurance for the period from November 15, 2017 to December 31, 2017 that classified bonus payments under code 8606 (Geophysical Exploration).

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On December 20, 2018, the Director of the Alaska Division of Insurance (Director) assigned the appeals to the undersigned Hearing Officer under provisions established in AS 21.06.170 - 21.06.230.

Discussion

I. ISSUE PRESENTED

The primary issue under appeal is the interpretation of Alaska exception to Rule 2-G, (“Interchange of Labor”), in the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance, as well as the application of the definition of “gross earnings” contained in Alaska Statute 23.30.395(22).

II. BACKGROUND

AS 23.30.045 makes an employer liable for workers' compensation payments to its employees. AS 23.30.075 requires an employer under AS 23, unless exempted, to either insure the employer's liability under AS 23 or furnish to the Division of Workers' Compensation, Alaska Department of Labor and Workforce Development (DOLWD), satisfactory proof of the employer's ability to pay directly the compensation provided for.

Workers' compensation insurance rates, manuals, and rating rules are proposed by the NCCI and approved by the director under AS 21.39.040. The National Council on Compensation Insurance (NCCI) is a licensed rating organization approved by the director under AS 21.39.060. NCCI's Basic Manual for Workers Compensation and Employers Liability Insurance - 2001 Edition (Basic Manual) sets out rules for classification assignment. Rule.

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Below is the Alaska exception to Rule 2-G, (“Interchange of Labor”), in the NCCI Basic Manual for Workers Compensation and Employers Liability Insurance.

4. A division of payroll with Code 8742, Code 8810, or Code 8871 is allowed for employees of a seasonal business who exclusively perform outside sales or clerical duties during a seasonal shutdown of that business’s basic classification operations when all of the following conditions are met:

a. The seasonal shutdown must be for a minimum of 60 consecutive calendar days within any 12-month period

b. The basic classification operation subject to the seasonal shutdown ceases entirely for that time period

c. The employees meet the eligibility requirements in Rule 1-B-2-a or 1-B-2-c during the seasonal shutdown

For purposes of this rule, a seasonal business is defined as a business whose basic classification operations are subject to a seasonal shutdown and not intended to continue through the entire calendar year.

The division of payroll with Code 8742, Code 8810, or Code 8871 is only allowed during the time of the seasonal shutdown. The entire payroll for an employee not performing outside sales or clerical duties defined in Rule 1-B-2-a or Rule 1-B-2-c during the seasonal shutdown must be assigned to the highest rated classification that represents any part of the employee’s work.

Code 8742, Code 8810, and Code 8871 are not available for division of payroll for an employee who qualifies for Code 5606 or if the basic classification wording applicable to the business includes outside sales or clerical.

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AS 23.30.395(22) states:

(22) "gross earnings" means periodic payments, by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer, including compensation that is deferred at the option of the employee, and excluding irregular bonuses, reimbursement of expenses, expense allowances, and any benefit or payment to the employee that is not fully taxable to the employee during the pay period, except that the total amount of contributions made by an employer to a qualified pension or profit sharing plan during the two plan years preceding the injury, multiplied by the percentage of the employee's vested interest in the plan at the time of injury, shall be included in the determination of gross earnings; the value of room and board if taxable to the employee may be considered in determining gross earnings; however, the value of room and board that would raise an employee's gross weekly earning above the state average weekly wage at the time of injury may not be considered;

RISQ and Avalon contend that the bonus payments made to employees should not be included under the governing classification. They state that due to a seasonal shutdown, the employees in question qualified for a division of payroll with the governing code and a standard exception code per Rule 2-G Interchange of Labor – Alaska State Exception in the Basic Manual.

American Interstate Insurance contends that the policyholder did not qualify for a division of labor under the conditions specified under Rule 2-G Interchange of Labor – Alaska

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State Exceptions. American Interstate Insurance contends that the payroll in question was correctly assigned to the governing classification code of 8606, rather than code 8810.

III. FACTS AND PROCEEDINGS

A. Initial Facts and Proceedings

Avalon is primarily engaged in mineral exploration services and was insured in 2017 for worker’s compensation purposes by American Interstate Insurance. The dispute concerns an interim audit performed by American Interstate Insurance for the period from November 15, 2017 to December 31, 2017. The Alaska Review Advisory Committee’s Workers’ Compensation Grievance Committee (ARAC) held a hearing on October 25, 2019 and sided in favor of American Interstate Insurance. RISQ and Avalon appealed the decision.

On December 20, 2018, the Director of the Alaska Division of Insurance (Director) assigned the appeals to the undersigned Hearing Officer under provisions established in AS 21.06.170 - 21.06.230.

The parties involved participated in a telephonic prehearing conference on April 4, 2019. Following this conference and discussion of all matters relevant to the hearing, the parties agreed to submit briefs of their respective arguments in this case, including their interpretations of how Alaska Statute 23.30.395 should be applied. The parties agreed to electronic communication regarding the briefs. An additional teleconference was to be scheduled once the briefs were received.

RISQ and Avalon’s brief were submitted on April 25, 2019. RISQ and Avalon argued that under AS 23.30.395(22) “gross earnings” should exclude irregular bonuses. They felt that this would more closely resemble Oregon’s exception under NCCI rule 2-B-2-n. They note that

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the bonuses are included in the individual contract signed with their employees. Then, they discussed the “seasonal shutdown” exception. They state that the operation was to be shut down for six months and was at its 38th day when the bonuses were paid. They state that it was an error to apply code 8606 to the bonus payments.

American Interstate Insurance started their brief by noting that both parties agreed that the NCCI Basic Manual had authority in the matter and that the payroll was reported and classified under code 8606 for every month of the interim audit period. They reject the argument that this was improper or that RISQ and Avalon were misled in any way. Regarding the definition of “gross earnings” under AS 23.30.395(22), American Interstate Insurance argues that the statute and definition only address the computation of compensation, not the basis for a premium in the workers’ compensation policy. They reaffirm that the NCCI Basic Manual is the authority. Additionally, they note that while Oregon has an exception for irregular bonuses, it is not relevant for an Alaska-based matter. They conclude by noting the presence of the bonuses in the employment contracts are not relevant to the matter and that it wasn’t introduced to the Grievance Committee, and that the committee’s decision should be upheld.

A second telephonic prehearing conference took place on June 5, 2019. Those in attendance were Lee Bridgman, Curt Freeman, and Barbara Sunday for the appellant, RISQ Consulting and Avalon Development Corporation; Beverly Gott and Sonny Marks for the appellee, American Interstate Insurance; Victoria Dorsey of the National Council of Compensation Insurance (NCCI) and Janet Wade, Hearing Officer, Dan Wilkerson, Assistant Attorney General, and Jackson Willard, Regulations Specialist II for the Alaska Division of Insurance. The parties indicated that they would like to schedule a hearing which would allow

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them to present oral arguments. During this this conference, the parties agreed to schedule a hearing to present oral arguments on July 19, 2019.

B. Hearing

The hearing took place on July 19, 2019. Those in attendance were Lee Bridgman, Curt Freeman and Barbara Sunday for the appellant, RISQ Consulting and Avalon Development Corporation; Beverly Gott, Rachel Coronel, and Sonny Marks for the appellee, American Interstate Insurance; Victoria Dorsey and Michael Craddock of the National Council of Compensation Insurance (NCCI) and Janet Wade, Hearing Officer and Dan Wilkerson, Assistant Attorney General for the Alaska Division of Insurance.

The first party to present oral arguments was Lee Bridgman from Risk Consulting. He stated that the Alaska Division of Insurance needs to provide clarification of Alaska Statute 23.30.395(22) which defines “gross earnings” as noted previously.

Mr. Bridgman stated that Oregon has a similar statute that excludes irregular bonuses from premium calculation. Mr. Bridgman also stated that Rule 2-G Interchange of Labor – Alaska State Exception in NCCI’s Basic Manual is applicable due to Avalon Development Corporation’s “seasonal shutdown”. He further pointed out that that the seasonal shutdown referenced in Alaska State Exception to Rule 2.G only requires that the basic classification operation must cease entirely for the period of the shutdown, therefore other aspects of the business may continue.

According to Mr. Bridgman, the policy period was from November 15, 2017 to November 15, 2018, and there had not been a geologist working in the field since October 28, 2017. Some had moved into the companies’ office to perform filing of permits and reports for

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their clients as well as the Department of Natural Resources. Other geologists were laid off after they completed their field work and were not hired back until the Spring of 2018.

Bonuses were paid out on December 4, 2017, 36 days into the seasonal shutdown. Avalon did report that the bonuses were paid in the basic class code of 8606. Mr. Bridgman stated that since the bonuses were paid during the seasonal shutdown, they should have been moved to a more appropriate class code and not reported in basic class code of 8606.

Finally, he concluded that the Alaska Division of Insurance and NCCI should have done what Oregon did, which was file a state exception to rule 2.B.2 to exclude irregular bonuses.

The second party to present oral arguments Beverly Gott from American Interstate Insurance. She opened by stating that the issue under dispute was the premium exposure at the interim audit. She stated that Alaska Statute 23.30.395 pertains solely to computation of compensation to an injured employee under the Alaska Workers' Compensation Act, not to payroll as forming the basis for the premium. She further stated that Oregon laws are not applicable in Alaska and therefore not relevant to an Alaska policy. She pointed out that Exhibit 3 provided by the appellant referred to the Oregon rules, not the Alaska rules.

She contends that according to the Alaska State exception to rule 2-G, there is no shutdown when payroll is reported to the policyholders' basic classification operation, 8606, for sixty days. She noted that the exception was created to allow an interchange of labor to clerical, classification code 8810, when a company is shutdown, (not working during the winter months). She reiterated that a shutdown means that no employees were subject to the basic class code of 8606 for sixty days.

The NCCI exception also states that the entire payroll for an employee not performing outside sales or clerical duties defined in Rule 1-B-2-a or Rule 1-B-2-c during the seasonal

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1 shutdown must be assigned to the highest rated classification that represents any part of the
2 employee's work.

3 She noted that the employees in question were not performing clerical works when the
4 bonuses were paid. Some were laid off in June or July, but they received a bonus in December.
5 This means that at no time during the interim period did the insured not report payroll in class
6 code 8606. When American Interstate performed the interim audit, the payroll records showed
7 field staff still working in class code 8606. She noted that American Interstate did not audit the
8 spreadsheet that was provided in the dispute conference (Appellants Exhibit 4). Per the previous
9 hearing the insured did admit to having field employees in the period in question, and stated
10 that the exception to rule 2.G is not applicable on a per employee basis.

11 She contends that American Interstate employees did not guide or instruct the insured to
12 report anything differently from what NCCI Manual states, and the insured did report
13 exposures in the governing classification code. The insureds records corroborate this.

14 The payroll for the exposure under dispute was paid to field employees in a bonus
15 fashion and per rule 2.B.1.c all bonuses are included for payroll calculation, unlike Oregon. All
16 bonus pay was included to the exposure representing the employees work. Classification code
17 8810 was allowed for bonuses when the employee was performing clerical work. All other
18 bonuses were allocated to the code where the employee worked prior to any layoff or
19 shutdown. The employees in question never worked in a clerical position, therefore there was
20 no basis to pay bonuses under 8810 during the interim audit period.

21 American Interstate Insurance believes that the decision of the NCCI grievance
22 committee should be upheld using the rules applicable to the state of Alaska.
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question was for six months, or possibly permanent if they chose not to bring the employees back. Based off of this evidence, they meet the first requirement.

B. Basic Classification Shutdown

The next requirement is whether the basic classification operation subject to the seasonal shutdown ceased entirely for the time period in question. When American Interstate performed the interim audit, the payroll records that were showed field staff still working in class code 8606. In the ARAC hearing, it was found that field staff were still working and that “activities contemplated under code 8606” continued. Per the previous hearing, the insured did admit to having field employees during the period in question, and the exception to rule 2.G is not applicable on a per employee basis. Due to this evidence, the operations under the basic classification code had not ceased entirely. Therefore, RISQ and Avalon have not met the second requirement.

C. Employee Eligibility Requirement

The final requirement is whether the employees were performing duties classified under codes 8742, 8810, or 8871 in accordance with NCCI Basic Manual Rule 1-B-2-a or 1-B-2-c. In this case, the evidence presented indicated that the employees in question were not performing clerical work when the bonuses were paid. Some were laid off months earlier; however, they did receive a bonus in December. The pay in question was not for work classified under codes 8742, 8810, or 8871, but instead as a bonus for work performed under code 8606. Therefore, RISQ and Avalon have not met the third requirement for Rule 2-G, and the bonus payment was properly classified as being under code 8606.

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D. Conclusion

Based on testimony provided by Lee Bridgman, Beverly Gott and Curt Freeman, the audit was correctly performed in accordance with rules established in the Basic Manual, specifically Rule 2.B.1 and the Alaska exception to Rule 2-G, (“Interchange of Labor”). RISQ and Avalon have not shown that they meet the requirements of Alaska’s exception to Rule 2-G. While the shutdown for the employees was longer than sixty days, it was not a complete shutdown of the operation, and the employees were not performing clerical or sales work in compliance with NCCI Basic Manual Rule 1-B-2-a or 1-B-2-c. Therefore, the audit performed by American Interstate Insurance for the period from November 15, 2017 to December 31, 2017 was done correctly, and the bonus payments properly classified under code 8606.

II. AS 23.30.395(22)

RISQ and Avalon requested clarification of Alaska Statute 23.30.395(22) which defines “gross earnings”; however, AS 23.30.395 pertains solely to the computation of compensation provided to an injured employee under the Alaska Workers’ Compensation Act, not to payroll as forming the basis for the premium. Unlike Oregon, Alaska does not exclude irregular bonuses from premium calculation, and requirements for Oregon are not applicable in Alaska. Therefore, AS 23.30.395(22) does not apply and is not relevant in this case.

II. HOLDING

I find

- That RISQ and Avalon do not qualify for a division of payroll under Alaska’s exception to NCCI Basic Manual Rule 2-G because the shutdown of the basic classification

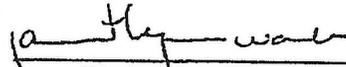
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operations was not a complete and total cessation of the operation and the employees were not performing duties in accordance with NCCI Basic Manual Rule 1-B-2-a or 1-B-2-c.

- AS 23.30.395 pertains solely to the computation of compensation provided to an injured employee under the Alaska Workers' Compensation Act, not to payroll as forming the basis for the premium; so it does not apply and is not relevant in this case.

Therefore, I decline to grant the relief sought by RISQ and Avalon and uphold the Committee's decision in this case to the extent consistent herein.

Dated August 28, 2019.

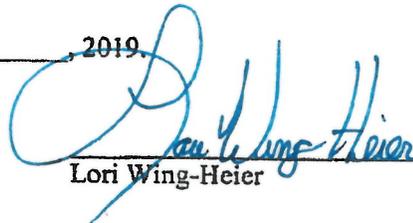


Janet Wade
Hearing Officer

Adoption

The undersigned director of the Division of Insurance adopts this Proposed Decision in Case No. H 18-07 as the final administrative determination in this matter. Pursuant to AS 21.39.170(c) and Alaska Appellate Rule 602(a)(2), you may appeal this final decision within 30 days. See the attached Notice of Final Order and Appeal Rights.

DATED this 28th day of August, 2019.



Lori Wing-Heier

Director

Non-Adoption Options

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1. The undersigned director of the Division of Insurance declines to adopt this Proposed Decision in Case No. H 18-07 and instead orders that the case be returned to the hearing officer to

take additional evidence about _____
make additional findings about _____
conduct the following specific proceedings: _____

DATED this ____ day of _____, 2019.

Lori Wing-Heier
Director

2. The undersigned director of the Division of Insurance revises the Proposed Decision in Case No. H 18-07 as follows: _____

Pursuant to AS 21.39.170(c) and Alaska Appellate Rule 602(a)(2), you may appeal this final decision within 30 days. See the attached Notice of Final Order and Appeal Rights.

DATED this ____ day of _____, 2019.

Lori Wing-Heier
Director

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I hereby certify that on the 29 day of August, 2019, I sent copies of this document to the following persons:

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**NOTICE OF FINAL ORDER
AND APPEAL RIGHTS
Case H18-07**

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The order signed by the Director of the Division of Insurance is the final order in this action.

Pursuant to AS 21.39.170(c), and the Alaska Appellate Rule 602(a)(2), you may appeal this final decision within 30 days.

AS 21.39,170(c) provides:

An order or decision of the director is subject to review by appeal to the superior court at the instance of a party in interest. The court shall determine whether the filing of the appeal will operate as a stay of an order or decision of the director. The court may, in disposing of the issue before it, modify, affirm, or reverse the order or decision of the director in whole or in part.

Alaska Appellate Rule 602(a)(2) provides:

An appeal may be taken to the superior court from an administrative agency within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under, agency regulations, whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal.

For other applicable rules of court, see Alaska Appellate Rules 601-612.