

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

IN THE MATTER OF)
)
HAWK CONSULTANTS LLC,)
)
Appellant.)
)
)
)

Case No. H 13-02

PROPOSED DECISION

Introduction

In 2012 the National Council on Compensation Insurance (NCCI) inspected Hawk Consulting LLC (Hawk), an Anchorage based construction management firm. NCCI's inspection report concluded that Hawk's basic classification should be changed from code 8810 (clerical office employees) to code 5606 (contractor-project manager, construction executive, construction manager, or construction superintendent) for twenty of the employees (all others were to continue in the code 8810). Hawk appealed the change to the Alaska Workers' Compensation Grievance Committee (committee). The committee upheld the classification change to 5606. Hawk then appealed the committee's decision to the director.

Discussion

The facts were established by NCCI's report and Mike Jens' (Jens) (a partner of Hawk) testimony at both the committee and appeal hearing. The testimony and report show Hawk is a construction management firm that provides staffing services mainly to the oil and

1 gas industry. About half of the staff they provide are office workers, but the firm also supplies
2 construction managers to clients. The construction managers plan construction projects and
3 make sure work takes place consistent with the technical specifications. The construction
4 managers report on the project to the client. The construction managers spend most of their
5 time at offices provided by the client, but about 10%-20% of their time is out of the office at
6 construction sites. If construction managers see any on-site issues they will contact the
7 management staff of the general contractor and the client. Hawk's personnel oversee the
8 project, but do not directly supervise any construction workers and are not responsible for
9 safety on the site. Nor do Hawk employees do any construction work.

11 At the committee hearing Jens, speaking for Hawk, told the committee its
12 construction managers should remain in classification code 8810. Jens testified that since the
13 firm's inception in 1985 construction managers have been classified to Code 8810 and that
14 code assignment had not changed though NCCI had made several audits since 1985. Jens noted
15 code 8810 had been originally assigned to construction managers since the firm was established
16 and the assignment had been affirmed through prior NCCI audits. He argued there had not
17 been any change in the way Hawk operated, Hawk has made no claims, and there was no basis
18 for NCCI to change the code.

19 Jens also disputed reassignment to code 5606. He pointed out code 5606 applied
20 construction contractors and Hawk was not a construction contractor and did no construction
21 work. He argued Hawk's construction managers' duties were similar to the executive
22 management staff of a general contractor and that several other companies had been assigned
23 code 8810 for these personnel.
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1 NCCI's representative replied that code 8810 was not appropriate because
2 Hawk's construction managers visited construction sites and code 8810 excluded duties that
3 entailed construction sites.

4 In executive session the committee considered codes 8810, 8601 and 5606. The
5 committee agreed code 8810 could not apply because the workers had duties at the construction
6 site. The members disagreed whether code 5606 could apply to Hawk because Hawk was not a
7 construction company or contractor. Because the duties of Hawk's construction managers were
8 similar to consultants the committee also considered code 8601, but concluded it did not apply
9 because the workers were not licensed engineers. The committee concluded code 5606 was the
10 best fit by analogy.

11 For its appeal Hawk no longer claimed that its construction managers should be
12 classified under code 8810, instead Hawk argued that code 8601 (architect or engineering firm-
13 including salespersons and drivers) should have been assigned to it as is a better fit to its
14 business than code 5606.

15 To support this position Hawk provided the testimony of Edward Prinz (Prinz),
16 who was qualified as an expert witness on NCCI code classifications. A report prepared by
17 Prinz is also a part of the record. At the appeal hearing Prinz testified code 5606 did not apply
18 to Hawk. He said code 5606 is a specialized code that applies to a small subset of construction
19 company workers. Because Hawk was not a construction company and did no construction
20 work Hawk was not exposed to "construction risks", making code 5606 inapplicable.

21 Prinz explained code 8601 was a better fit for what Hawk does. Hawk's
22 construction managers spend most of their time doing clerical work with occasional visits to
23 sites to see how the work is being done and reporting to the client regarding the progress and
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1 quality of the work. This makes Hawk a specialized consulting service not a construction
2 business.

3 Prinz pointed out that nothing in the Scopes Manual entry for code 8601
4 requires the business to be a licensed engineering firm and expressly allows energy
5 conservation consulting firms, which are not licensed engineering firms, to be assigned to code
6 8601.

7 Conclusion

8 The committee found that the construction managers were acting somewhat as
9 consultants and considered code 8601 for Hawk, but rejected it because the construction
10 managers were not licensed engineers. The committee also disagreed over the assignment of
11 code 5606 since Hawk is not a contractor or construction company.

12 I find that Hawk should be assigned to code 8601 to the employees noted as
13 construction managers and its experience modifier be recalculated to reflect this change.

14 The Scopes Manual description of code 8601 states "Operations conducted by
15 these firms usually include consultations with clients; research on behalf of clients; site
16 inspections; and the compilation of information to enable these firms to make recommendations
17 to clients". (NCCI Scopes Manual, 2010 Edition) This description is a close match to the
18 activities described for Hawk. Prinz pointed out there was no requirement that a business
19 needed to provide licensed engineers to be assigned this code.

20 Code 5606 says it is "intended to cover the project manager, construction
21 executive, construction manager, or construction superintendent of both specialty and general
22 contracting risks". Hawk provides construction managers to clients that oversee and report on
23 construction projects, but Hawk is not a construction company, does no construction work; and
24 does not supervise any construction workers. Hawk is not responsible for the construction
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projects, but provides construction managers to act as the eyes and ears of the client. Under these facts there is no significant "construction risk" attaching to Hawk making code 5606 inappropriate.

Though neither code is an exact fit for the activities of Hawk, the best fit by analogy is code 8601.

Dated this 4th day of February, 2014.

Joanne S. Bennett

Joanne S. Bennett
Hearing Officer

Adoption

The undersigned director of the Division of Insurance adopts this Proposed Decision in Case No. H 13-02 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 6 day of February, 2014.

Marty B. Hester

Marty B. Hester
Acting Director

Non-Adoption Options

1. The undersigned director of the Division of Insurance declines to adopt this Proposed Decision in Case No. H 13-02 and instead orders that the case be returned to the hearing officer to

_____ take additional evidence about _____

_____ make additional findings about _____

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___ conduct the following specific proceedings: _____

DATED this ___ day of _____, 2014.

Marty D. Hester
Acting Director

2. The undersigned director of the Division of Insurance revises the Proposed Decision in Case No. H 13-02 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 _____, 2014.

Marty D. Hester
Acting Director

I hereby certify that on the ___ day of February, 2014 I mailed copies of this document to the following persons:

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