



Pennsylvania Compensation Rating Bureau

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June 1, 2007

BUREAU CIRCULAR NO. 1529

To All Members of the Bureau:

Re: CLASSIFICATION APPEAL DECISION
PENNSYLVANIA INSURANCE DEPARTMENT
PENNSYLVANIA COMMONWEALTH COURT

In the interest of providing Bureau members with information on classification issues and decisions of significance, we advise you of the following classification appeal and its ultimate resolution. This appeal was initially brought before an Appeals Subcommittee of the Classification & Rating Committee of the Pennsylvania Compensation Rating Bureau (Subcommittee) in April 2004. The facts of the appeal are as follows.

The employer involved in this matter, Hub Tire Company, Inc. (Hub), is engaged in the sale, installation and balancing of tires and also performs automobile repairs and state inspections. Hub disputed its carrier's assignment of all payroll to Code 815 for its 2002 policy, stating that such assignment did not, in their opinion, fairly represent the risks involved. The counterpersons wait on Hub's retail customers and write up sales orders for tires and/or vehicle repairs using a personal computer. The counterpersons will contact a tire changer or mechanic over an intercom regarding the work required. Once the work is completed, the counterpersons will accept payment from the customers. Three counterpersons will interchange between waiting on retail customers and developing wholesale tire sales by telephone. All of these people have desks located behind the customer counter. There are two additional employees who also work at desks located behind the customer counter. One such employee spends one day a week at their desk contacting wholesale tire customers by telephone and completing paperwork. The second such employee is also part time and performs bookkeeping.

Hub distributed a letter to the Subcommittee from the president of the Tire Dealers Association of Western Pennsylvania in support of their position. The letter set forth the opinion that the salespersons, cashiers or administrative staff of tire dealerships do not present the same risk exposure as do tire changers or repair technicians. For this reason the letter advocated that these employees should be classified based on their job descriptions, arguing that adoption of such a system would provide rating values more consistent with each employee's prevailing risk factors.

Hub stated further that it was the only tire dealer insured by its carrier that had had its entire counter staff payroll assigned to Code 815. It was suggested that other similar employers commonly assigned their counter payroll to Code 951, Salespersons – Outside, or to Code 953, Clerical. Staff replied that a review of Bureau test audits conducted between January 2003 and March 2004 revealed 16 employers insured by Hub's workers' compensation insurer and assigned to Code 815. Hub was not one of the 16 employers whose test audits were examined for this review. Rather, Hub had been a "special" audit requested by the employer. Nine of those test-audited policies did not involve any counter or estimating employees. Of the remaining seven test audits, all but one had their counter/estimating employees properly assigned to Code 815. The one test audit difference involved two employees whose lack of physical separation from the counter required their assignment to Code 815, while the carrier assigned Code 953. Hub responded to this disclosure by asking whether the Bureau had also checked audits of other workers' compensation insurers. Staff replied that, because Hub's complaint was most pertinent to his own workers' compensation insurer, a broader investigation of carrier test audits had not been undertaken. Hub was asked to provide the Bureau with names of other tire dealers who it knew or believed had assigned their counterpart's payroll to Code 953. Hub declined that request.

When asked to explain to the Subcommittee what relief it was seeking, Hub replied that it wanted its counterpart's payrolls assigned to Code 953, Clerical Office (as had been done by his previous workers' compensation insurers), Code 951, Salespersons - Outside, or Code 819, Automobile Salespersons. Hub acknowledged that the third alternative would effectively require the concurrent reassignment of tire dealers from Code 815 to Code 818, Automobile Dealer, a reassignment that would result in the resolution of the appeal. In reply to a Subcommittee question, Hub stated that, for the previous ten policy years, it had been subject to voluntary/mail audits. Further, it had sought a sales assignment for the counterpart in the past, but this request had been disapproved.

Hub further opined that the Bureau could address its concerns by restoring Code 823, Tire Dealer, as a Bureau classification. There was a dialogue between staff and Hub on this point, staff observing that Code 823 had been discontinued because the tire business had changed, placing less emphasis on the sale, installation and/or repair of tires and greater emphasis upon the performance of a broader variety of vehicle repairs. Because of this convergence of operations (and rating values) between Codes 815 and 823, the Bureau had proposed that Code 823 be discontinued and the operations previously contemplated by Code 823 be merged back into Code 815. This proposal had been approved by the Insurance Commissioner to become effective upon new and renewal policies of January 1, 1991 and later and had resulted in a decrease in premium for tire dealers at the time.

After review of the information presented, the Subcommittee agreed that there appeared to be no dispute regarding the factual information about Hub's operations and how such operations were conducted. The Subcommittee also agreed that Hub's 2002 workers' compensation insurer had, in accordance with applicable rules, correctly classified their counterpart to Code 815 (as modified by the Bureau's special audit). The Bureau had disagreed with how the carrier had classified one employee. This person worked at home performing bookkeeping and was reassigned by the Bureau to Code 953. A Subcommittee member stated that, while employers could be misclassified in whole or in part for some periods of time, if and when a new carrier to such an employer became aware of any misclassification, a correction in conformance with applicable rules was required despite the possible perception by the employer that past practice provided a precedent for perpetuating previous errors.

Accordingly, upon motion made and duly seconded, the Subcommittee voted to deny Hub's appeal and to sustain the Bureau's assignment of Code 815 to their counterparts. The motion was approved unanimously.

Subsequently, Hub appealed this decision to the Pennsylvania Insurance Commissioner. A hearing was held on November 2, 2004. The Commissioner sustained the Appeals Subcommittee's decision to assign Code 815 to Hub's counterparts on April 4, 2005 (Docket No. CL04-05-024). Hub then appealed to Pennsylvania Commonwealth Court, where the Insurance Commissioner's decision was affirmed on December 23, 2005 (No. 939 C.D. 2005).

Timothy Wisecarver
President

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