Portland Airport Limousine Co., Inc., *d/b/a* PALCO AIR CARGO	]	
	]	
v.	]	
	]	
AMERICAN INTERSTATE INSURANCE COMPANY	]	**DECISION AND ORDER**
and	]	
NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.	]	
	]	
Docket NO. INS-04-102	]	

This adjudicatory proceeding arises out of a petition filed with the Superintendent pursuant to 24 A M.R.S.A. §§ 229 and 2320(3) by Portland Airport Limousine Co., Inc., doing business as Palco Air Cargo,[1] requesting that the Superintendent prohibit Palco's workers' compensation insurer, American Interstate Insurance Company, from reclassifying Palco's business for rating purposes and from raising its premium accordingly. A hearing was held before the Superintendent on April 13, 2004, at which the parties presented evidence and argument regarding the merits of the classification.[2] The hearing was recessed until June 8 to enable the parties to present evidence and argument relating to the timeliness of the premium audit and other relevant issues independent of the merits of the classification. The record closed upon the submission of the parties' post-hearing briefs on June 15, 2004. For the reasons set forth below, the Petition is denied as it relates to the proper classification of the business, but granted in part as it relates to when and how the reclassification may be implemented.

Account History

Most of the facts set forth below are uncontested. To the extent that any of them may be in dispute, I have found them to be proven by a preponderance of the evidence on the record.

Historically, Palco's business was classified for workers' compensation rating purposes under Code 7231 (Trucking – Mail or Parcel Delivery) in the uniform classification system for workers' compensation insurance rating.[3] This is the second time Palco's classification has been before the Superintendent. In *Palco Air Cargo v. Star Insurance Company,*No. INS-03-415 (Me. Bur. Ins. June 27, 2003), Palco had objected to Star's proposal to reclassify it under Code 7229 (Trucking – Long Distance Hauling), at a substantially higher manual rate. However, no decision was rendered on the merits of the classification. In essence, that question was determined to be moot because Star had failed to provide sufficient

advance notice to allow it to implement the reclassification before the effective date of Palco's American Interstate replacement coverage.

The American Interstate policy took effect on November 1, 2002. As requested in Palco's application, all nonclerical employees were classified under Code 7231. André Schehr of the Dunlap Agency, the producer who placed the account, had written American Interstate on September 25 to make a "rush request" on Palco's behalf because Star had given Palco notice that its premium would be increased 60% on renewal. American Interstate did not inquire into the reason for the premium increase. Before issuing the policy, American Interstate conducted an on-site loss control survey which described Palco's operations. However, this survey was not conducted for purposes of verifying the account's classification, and American Interstate's underwriting department did not review the classification at that time.

During the winter of 2002–03, Palco reported several claims. American Interstate conducted an additional on-site loss control inspection on April 29, 2003. American Interstate conducted another on-site inspection on March 4, 2003, which was "a routine interim audit primarily intended to verify proper reporting of payroll," according to the testimony of American Interstate Senior Underwriter Alisha Russell. The premium auditor concluded that Palco was a "trucking company" which "may also haul small packages but that would appear to be incidental to their main operations." The inspector therefore recommended reclassifying Palco's operations under Code 7228 (Trucking – Local Hauling). Palco objected to the reclassification, and on June 13, Jennifer Riplie of American Interstate wrote to Ms. Schehr agreeing that American Interstate would only apply the new classification prospectively, for operations on and after June 13, with Code 7231 continuing to apply secondarily on an "if any" basis. Palco continued to report all its payroll under that secondary classification, and American Interstate based its interim billing on those reports.

American Interstate offered to renew the policy for 2003–04, but without Code 7231. Palco again objected, and filed a consumer complaint with the Bureau of Insurance. On October 22, Mark Bernstein, Palco's president, wrote to Ms. Schehr asking whether American Interstate would consider reinstating Code 7231 "for NH drivers and 4 drivers in Maine. These guys drive straight trucks and do not drive tractors." Shortly thereafter, Ms. Russell wrote the Bureau on behalf of American Interstate, advising that:

We have engineered this account and find that a large portion of the payroll should be allocated to the 7228 Trucking classification. Our original quotation allocated all payrolls in the 7228 classification generating a premium of $297,979.... I have revised quotation and am going to allow a split in payrolls in Parcel Delivery service 7231 and Trucking 7228. Revised payrolls per agent and insured will generate an

estimated premium of $132,523. [I] intend to order an interim audit in about 30 days to confirm separation of payroll between the two classes and the accuracy of the split I have approved.

On October 24, American Interstate issued a renewal quotation, which Palco accepted, allocating all the nonclerical New Hampshire payroll and approximately 5/6 of the nonclerical Maine payroll to Code 7231, and continuing to apply a 25% schedule rating debit surcharge. The remaining 1/6 of the Maine payroll was allocated to Code 7228. For Maine, the manual rate for Code 7228 was approximately two and a third times the rate for Code 7231. For New Hampshire, the Code 7228 rate was approximately 64% higher than the Code 7231 rate.

American Interstate then requested an inspection by the National Council on Compensation Insurance, Inc. ("NCCI"), the advisory organization designated by the Superintendent pursuant to 24 A M.R.S.A. § 2382-B to administer the uniform classification system for workers' compensation risks. After initial resistance by Palco, NCCI inspector Rick Ekstrom visited the site on March 3, 2004. He reported on March 16 that Palco's nonclerical operations should be classified exclusively under Code 7228, not Code 7231. On March 17, Ms. Russell wrote to Ms. Schehr that "our intent is to endorse policy to remove 7231 Trucking Mail and allocate all payroll in the 7228 classification. Please share your [intentions] with your customer and confirm to me." Ms. Schehr wrote Mr. Bernstein the same day by e-mail, attaching a copy of the NCCI inspection report and informing Mr. Bernstein that American Interstate "has advised that they will be endorsing the policy effective 11/1/03 to revise the policy to include 7228."

Also on March 17, 2004, the Dunlap Agency sent Palco its 2003–04 policy, effective November 1, 2003. That policy included the October 24 premium quotation. Meanwhile, American Interstate had conducted its final premium audit on the 2002–03 policy and the auditor issued his report on January 7, 2004. Because workers' compensation premiums are calculated on the basis of the employer's payroll during the policy period, all premium bills while the policy is in force are provisional and the premium actually owed is determined through an audit conducted after the policy has expired and the relevant payroll records are available.

Ms. Russell testified that "we absolutely knew that the insured would contest the premium based on the still unresolved class code issue. We therefore held the bill until NCCI resolved that issue, with the hope that while the insured might be suspect of the opinion of a contracted [American Interstate] auditor, he would accept that of an NCCI inspector." American Interstate sent the final bill for the 2002–03 policy to Palco on March 31, two weeks after the NCCI inspection report. The amount billed is based on the use of Code 7228 for the entire policy

period. However, as noted below, American Interstate has acknowledged that this figure was erroneous, and agrees that Code 7231 should apply for the period of coverage between November 1, 2002 and June 13, 2003.

The Governing Classification

The fundamental question in dispute is how this business should be classified. For the reasons discussed below, I find that NCCI and American Interstate have correctly determined that as Palco's operations are presently structured, it should be assigned Code 7228 as its single governing classification.

According to the NCCI inspection report, the Maine and New Hampshire operations "are the same." About 85% of Palco's gross receipts come from deliveries of individual packages that weigh less than 30 pounds (65%), primarily to retail stores, and from deliveries of parcels and envelopes (20%) to post offices, private courier facilities, and retail stores. About 5% of the package delivery, which means slightly more than 3% of the overall gross receipts, is delivered in palletized form and billed by the pallet. With that exception, Palco bills by the piece for the packages, parcels, and envelopes. The remaining 15% of Palco's gross receipts is for containerized freight which Palco picks up from airports and from the Port of Boston. The fleet, at the time of the inspection, consisted of 12 tractor-trailer cabs with trailers, 6 vans, and 14 box trucks.

The report found only an incidental volume of deliveries, less than 5%, in excess of 200 miles. It is undisputed that Code 7228 (Trucking – Local Hauling Only) would be the applicable classification to the extent that Code 7231 (Mail, Parcel, or Package Delivery) does not apply. Code 7231, as defined in the NCCI *Basic Manual:*[4]

Applies to risks engaged exclusively under contract in local delivery of mail, parcels, or packages limited to 100 pounds or less. Mail, parcels, or packages, as shown in the classification phraseology, refers to those items where the delivery tariff or charge is allocable to the individual envelope, parcel, or package. This classification would not be applicable to truckers hauling packaged goods or merchandise where the haulage or transport charge is based on a truckload or partial truckload, the cumulative weight of the packages and/or parcels being transported or a flat contract price for the consignment.

In the absence of any additional guidance or evidence to the contrary, I would find that the operations described above – with the exception of the delivery of containerized and palletized freight – all fit the general description of local delivery of mail, parcels, or packages. This is also what the inspector found. The only suggestion to the contrary was made

at the hearing by Palco, which points out that the pallets and the containers contain mail, parcels, and packages, so the bulk shipments necessarily involve delivery of mail, parcels, or packages. By the same reasoning, selling a car is selling auto parts. Package delivery and bulk freight delivery are different activities even if the bulk freight contains packages. Although Palco has suggested reasons why delivering containers might actually be safer than delivering individual packages, one could also speculate about the reasons why actual loss experience appears to support the opposite conclusion. Which activity is actually safer is irrelevant to this case, since the underlying manual rates for these classifications have not been challenged.

Therefore, I adopt the inspector's finding *(emphasis in the original)* that "The insured primarily performs local [delivery] of parcels, envelopes and packages that weigh less than 100 lbs.... It does not however perform these deliveries exclusively; the insured also delivers palletized and containerized freight (the palletized and containerized freight weighs more than 100 lbs.)." The bulk freight delivery is an integral part of Palco's business, not a rare incidental activity. Thus, as Palco's operations are presently structured, the more general code for local trucking properly applies, not the specialized code for "risks engaged exclusively" in mail, parcel, and package delivery.

The "engaged exclusively" standard in the definition of Code 7231 is not "extreme and unreasonable," as argued by Palco, but rather is consistent with the general principle, as set forth in *Basic Manual* Rule I-D, that "The purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer within a state. Subject to certain exceptions described in this rule, each classification includes all the various types of labor found in a business." *See Imagineering, Inc. v. Superintendent of Insurance,* 593 A.2d 1050 (Me. 1991). Although Palco has suggested that it might be able to restructure its business in the future so as to either discontinue bulk freight activity or firewall it in a manner sufficient to meet the "separate operations" exception set forth in *Basic Manual* Rule I-D(3)(c), it has not done so at this time and none of the other exceptions to the single classification rule could conceivably apply to Palco.

The inspector noted another reason why he found Code 7231 inapplicable. This code is defined as applying to risks engaged in delivery "under contract," and the inspector found that Palco's "delivery is performed on a per-order basis, not by a verifiable written contract. [It is recognized that, in the absence of a written contract, the insured enjoys ... long-standing relationships with their customers for whom they perform delivery.]" This suggests that NCCI might be interpreting "under contract" as used in the definition of Code 7231 in an inappropriately narrow manner, inconsistent with the broad definition of "under contract" in the Basic Manual's general

description of the trucking category, which focuses on the distinction between work performed under contract for others and work performed in support of the insured's own operations, and emphasizes that all work involving "hauling under contract" must be rated according to one of the trucking classifications. It is possible that the inspector, as a nonlawyer, was under the misapprehension that certain documentary formalities are part of the definition of "contract."

On the other hand, it is also possible that the key to the inspector's finding was the word "verifiable." If the lack of sufficient documentation made it impossible to verify Palco's claim that its delivery of individual articles was billed at a piece rate as required to qualify for Code 7231, rather than being based on such factors as "a truckload or partial truckload, the cumulative weight of the packages and/or parcels being transported or a flat contract price for the consignment," then Code 7231 could not apply even if the bulk freight operations were discontinued or reconfigured as a separate business.

The 2002–03 Policy and the 120-Day Rule

With limited exceptions, pursuant to Bureau of Insurance Rule 470, §§ 4 and 5, the final premium on a workers' compensation policy must "be established not later than 120 days after the policy ends" and "the insurer is prohibited from billing or collecting any additional premium exceeding the latest billed premium immediately prior to the 120-day time limit." 120 days after the 2002–03 policy expired was March 1, 2004, and it is undisputed that Palco was not sent the final audit bill until March 31. Therefore, it is unnecessary to consider how the factual findings on the merits of the classification affect Palco's 2002–03 premium, because it is undisputed that Palco owes every penny it was billed before March 1 on the 2002–03 policy.[6]

Rather than concede gracefully that it is barred from collecting any additional premium on the 2002–03 policy because it failed to bill Palco in a timely manner, American Interstate has chosen to argue that the law imposes no such requirement. Although this position is totally at odds with the purpose and established interpretation of the Rule,[7] American Interstate's arguments are sufficiently nonfrivolous that they cannot be dismissed out of hand.

American Interstate relies on a textualist interpretation of the Rule. Textualism is a popular legal philosophy based on the assumption that decisionmaking will be more objective if the language of statutes and regulations is interpreted in a vacuum without letting distractions like intent and context get in the way. Focusing on the plain language of Rule 470, American Interstate observes that Section 4, which establishes the 120-day deadline, requires only that the final premium be "established"

by the insurer within that time, not that it be "established and billed." American Interstate acknowledges that Section 5 does require the insurer to use premium billed within the deadline and expressly prohibits the insurer from billing any additional amount, but observes that by its terms, Section 5 does not impose a general requirement on all insurers, but rather establishes the sanction when the insurer has not "established" the premium in a timely manner.

Thus, according to American Interstate, as long as the insurer has "established" the final premium amount through some internal process, it is under no legal requirement to communicate that amount to the policyholder at any specific time. From a textualist perspective, this makes some sense. Section 4 reads, in its entirety: "Except for policies issued subject to retrospective rating, the final premium shall be established not later than 120 days after the policy ends." One could imagine this sentence appearing in an insurance company's operations manual and referring to some internal office procedure.

However, I am not called upon to interpret a company's operations manual, but rather a legal obligation imposed upon all workers' compensation insurers doing business within the State of Maine for the express purpose of ensuring "that the insured receives reasonably prompt notice of his *[sic]* obligations under the policy." Rule 470, § 1. It is not necessary to resort to such nontextualist concepts as public policy and common sense to divine the purpose of the Rule, since that purpose is codified at the beginning of the Rule itself. An interpretation of "establish" that reads all notice requirements out of the Rule would frustrate that fundamental purpose.[8]

If it were important, I would take the time to research whether the use of "establish" in Rule 470 might be derived from its use in insurance industry rating manuals and might have developed a specialized meaning in that context. However, American Interstate's argument fails on its own premise, since the dictionary definitions upon which it relies do not support its interpretation of the Rule. The very first meaning of "establish" that American Interstate quotes from *Black's Law Dictionary* is: "To settle firmly, to fix unalterably." The final premium has not been settled firmly or fixed unalterably until the insurer has made a binding commitment by communicating it to the insured.

Although the concept of billing may not be inherent in the general definition of the word "establish," it is inherent in the definition of the phrase "final premium" as used in Rule 470, because that phrase means nothing more nor less than the final premium bill, the amount the insurer agrees to accept in full satisfaction of the account. It cannot possibly mean "final" premium in the sense of a figure binding on both parties, since that figure cannot be "established" unilaterally by the insurer, nor

can it be "established" until the policyholder has somehow found out what that amount is and has been given a reasonable opportunity to contest it.

Furthermore, American Interstate's interpretation of the requirement to "establish the final premium promptly" does not even accomplish the textualist goal of objectivity. As has been illustrated in this case, trying to prove that the final premium has been "established" requires an inquiry into a chain of events that took place behind closed doors, trying to pin down when and how certain decisions were made and who had the authority to "fix unalterably" the bill before it went out the door.

And in this case, even if American Interstate were correct on the law, it has not offered any persuasive evidence that the amount billed was actually "established" before the deadline, even internally. In its brief, American Interstate argues *(emphasis in original)* that "According to AIIC's premium audit report dated January 7, 2003 and the affidavit of Alisha Russell, AIIC very definitely established the final premium on January 7, 2004, well within 120 days of policy expiration. The amount AIIC established was $34,400." To say that this figure[9] was "established" before March 1 is a highly creative use of the term, and not supported by any of the dictionary definitions cited. The amount actually billed on March 31 was $86,280, which was based on the use of Code 7228 for the entire policy period beginning on November 1, 2002, although American Interstate concedes that Code 7228 should not have been used before June 13, 2003. If the audit premium had already been "established" as $34,400 or $33,430 at the time the bill went out, the decision to bill $86,280 would be inconsistent with the stated rationale for delaying the bill until after the NCCI inspection report was available, the hope to minimize controversy between Palco and American Interstate.

Although American Interstate describes the audit report and Ms. Russell's affidavit as demonstrating that American Interstate "very definitely established the final premium on January 7, 2004," the affidavit itself is far from definite. Ms. Russell actually testified merely that: "I believe that we established the final premium on or about January 7, 2004," which is the date appearing on the audit report. The audit report itself did not "establish" the final premium because it does not include any actual premium calculations, only payroll figures by classification. It could not have been used to "establish" the final premium, because the auditor reclassified some of the payroll to Codes 7229 (Trucking – Long Distance Hauling) and 8742 (Salespersons, Collectors, or Messengers – Outside), explaining that it would be necessary to "leave final decision to the company" regarding those codes. An internal memo dated January 30 supports Ms. Russell's testimony that American Interstate was still "attempting to decide what to do about adding 7229 and 8742, which were not on the policy and not used in establishing final premium, but possibly applicable nevertheless." Neither does any other document in

evidence purporting to predate March 1, 2004 contain any of the three figures allegedly "established" by American Interstate: or $33,430, $34,400, or $86,280. It is more likely than not, based on the evidence before me, that American Interstate did not merely defer mailing the final premium bill until after receiving the NCCI inspection report in mid-March, but also deferred performing the actual final premium calculation.

Finally, in the alternative, American Interstate contends that even if it did not establish the final premium before March 1, it should be excused from compliance because "the delay was the fault of PALCO in refusing to allow NCCI to perform the inspection that AIIC needed in order to complete the audit. In this regard, the failure of AIIC to send a letter advising PALCO of the delay should be excused since it was PALCO that caused the delay."

The argument that American Interstate could not establish the final premium until NCCI had conducted its inspection further calls into question the claim that American Interstate could and did establish the final premium nearly two months before NCCI conducted its inspection. However, as American Interstate implicitly acknowledges, Section 7 of Rule 470, requires the insurer, even if good cause exists for extending the 120-day deadline because the insured has failed to cooperate, to "notify the insured in writing prior to 120 days from the end of the policy period of the reasons for the inability to establish the final premium." American Interstate arguably has alleged reasons why Palco made it impossible to establish the final premium before March 1, but there is no evidence that Palco had the power to render American Interstate unable to give the required notice.

The 2003–04 Policy

Finally, the most difficult issue in this case is determining what restrictions, if any, apply to the use of Code 7228 on Palco's 2003–04 policy. Although the e-mail message Mr. Bernstein received on March 17, 2004 was not artfully worded, it is clear that Palco was on notice at that point that NCCI had ruled in American Interstate's favor, and that American Interstate intended to eliminate Code 7231 entirely from the policy and reclassify all nonclerical payroll under Code 7228, retroactive to the policy's inception on November 1, 2003. The request for hearing that initiated this proceeding was dated March 18, and began "I'm writing this letter in protest of NCCI changing our class code." As discussed above, I have found that reclassification to be valid. However, for the reasons discussed below, it may be applied only as of March 18, not retroactively to November 1.

American Interstate argues that the premium quotation issued on October 24, 2003 had no binding effect because a premium quotation by its nature is only an estimate, and "is not a contract or offer to contract." Ms.

Russell testified that her "intent was to split the payroll until we could determine once and for all which class code should apply, whether one or the other might be a governing class, and to prevent an interim 'sticker shock' until we had a final answer to the code issue." It is questionable whether the appropriate way to prevent an interim sticker shock is by making a bait-and-switch offer, with the intent to sandbag the customers with a retroactive sticker shock after they have already taken title and driven the vehicle off the lot. However, American Interstate argues further that even if its conduct might be seen as inequitable, "There is no estoppel because there was no detrimental reliance. [Ms. Schehr] admitted that she had no other takers for the risk and that she considered all viable options. Without evidence that [Ms. Schehr] declined another option there can be no estoppel since there can be no reliance."

Before analyzing whether there are any equitable grounds for modifying the terms of the contract, the fundamental question is what the terms of the contract were. American Interstate is correct that a premium quotation is only an estimate, that the policyholder's actual premium obligation is to pay the appropriate rate based on actual payroll, properly classified, and that policyholders are given adequate notice of this when they obtain coverage. However, this particular premium quotation was unquestionably the result of negotiations between the parties, and Ms. Russell wrote the Bureau of Insurance at the time the offer was made explaining that the purpose of the proposed interim audit was not to reclassify the entire operation under Code 7228, but rather "to confirm separation of payroll between the two classes and the accuracy of the split I have approved." It is inconsistent with the history of this dispute as it unfolded to suggest that the "approved split" was merely to allocate payroll however NCCI might subsequently decide with the hope that the decision would be to allocate zero payroll to Code 7231, or to assert that the allocation of 5/6 of the Maine payroll and all the New Hampshire payroll to Code 7231 was just a temporary placeholder based on how Palco had self-reported its payroll after Code 7228 was added in June – how Palco had actually self-reported, after all, was to continue to place all its payroll in Code 7231 and wait for American Interstate to try to change it.[10]

I find, rather, that American Interstate had agreed to assign two basic classifications for Palco, as if it had been conducting two "separate operations" within the meaning of the *Basic Manual*. It should be noted that the 5-to-1 allocation of Maine payroll is not inconsistent with NCCI's findings regarding the proportion of Palco's revenues that were derived from deliveries of the general type contemplated by Code 7231. As for the terms of the agreement, I conclude based on the evidence provided that what American Interstate agreed to on October 24, or should be deemed to have agreed if there was no precise agreement, was to accept

Mr. Bernstein's proposal (a proposal consistent with an intuitive understanding of how one might at least begin to draw the line between bulk freight and package delivery) to classify the drivers who "drive straight trucks and do not drive tractors" in Code 7231, and the drivers who drive tractors in Code 7228. Whether the Maine and New Hampshire drivers Mr. Bernstein identified as falling in that category do in fact fit that description will be subject to verification upon audit.[11]

The final question is how long American Interstate remains bound by that agreement. Is there a contractual or equitable obligation to continue to use two basic classifications for an entire year, or can American Interstate implement the NCCI reclassification which I have upheld? Again, the terms of the contract provide the appropriate answer. The reclassification constitutes a "correction in classification" within the meaning of *Basic Manual* Rule I-F(3), not a "reallocation of payroll among classifications on the policy" within the meaning of *Basic Manual* Rule I-F(4), because it was based on a determination that the overall classification of the business was erroneous in the first place, not on a determination that certain workers were erroneously allocated between the operations American Interstate had agreed to assign Code 7231 and the operations American Interstate had agreed to assign Code 7228. *Crowe Rope Industries, LLC v. Wausau Underwriters Insurance Co.,* No. INS-00-11. Therefore, because the March 16 inspection report was issued more than 120 days after the inception of the policy (as with the audit of the prior policy, that date was March 1), the correction cannot be applied to the policy until "the date the company discovers the cause for the correction." *Basic Manual* Rule IV-F(3). However, since Palco's experience modification and schedule rating were both based on the more favorable classification, the experience modification factor should be recalculated and the schedule rating debit should be removed.

Is there any exception to the 120-day rule or any equitable consideration in favor of Palco that compels a different effective date than March 16? It is not necessary to delve into the details of who knew what when, because it is clear that at least by the time American Interstate made its renewal offer on the 2003–04 policy and Palco accepted it, both sides were well aware of the classification dispute and of the general issues of that dispute. Thus, American Interstate cannot implement the reclassification earlier on the basis of a claim that "the correction in classification is the result of a misrepresentation or omission by the insured" under *Basic Manual* Rule IV F(3)(a), nor can Palco claim that the NCCI report came as an unfair surprise. Palco was aware for months that American Interstate was seeking to reclassify the risk and that an NCCI inspection report was pending, Palco had notice of the report the day after it was issued, and Palco had the chance to procure replacement coverage but was unable to do so.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that the Petition is *GRANTED IN PART AND DENIED IN PART:*

1. For the 2002–03 policy, Palco's premium obligation for that policy is limited to amounts billed by American Interstate before March 1, 2004.
2. For coverage on or after November 1, 2003 and before March 16, 2004, Palco's tractor-trailer drivers shall be classified under Code 7228, and Palco's other drivers shall be classified under Code 7231, with an appropriate allocation of other nonclerical payroll consistent with the scope of those operations. This allocation applies to both Maine and New Hampshire operations.
3. For coverage between March 16, 2004 and November 1, 2004, American Interstate may apply Code 7228 as Palco's single basic classification, provided that as of the effective date of any reclassification, no schedule rating debit is applied and Palco's experience modification factor is adjusted to reflect the higher expected losses applicable to the new classification.
4. NCCI's determination that Code 7228 is the appropriate basic classification for Palco's current operations is upheld.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 (2000) and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before August 24, 2004. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

JULY 15, 2004

_____
ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER

[1] In New Hampshire, the Petitioner does business as New Hampshire Freight Co. The same corporate entity operates both businesses, which are insured on the same policy. The Petitioner will be referred to herein simply as "Palco."

[2] Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decisionmaking authority.

[3] Pursuant to 24-A M.R.S.A. § 2382-B, workers' compensation insurers must adhere to a uniform classification system approved by the

Superintendent and administered by the designated workers' compensation advisory organization. As noted below, that organization is NCCI, which is a party to this proceeding.

[4] Pursuant to 5 M.R.S.A. § 9058, the Superintendent has taken official notice of both the NCCI *Basic Manual*, filed by NCCI pursuant to 24 A M.R.S.A. § 2382-B(3), and the NCCI*Scopes Manual* (formally entitled *Scopes of Basic Manual Classifications),* containing more detailed descriptions of the various classification codes. These manuals, to the extent that their provisions have been approved by the Superintendent, have the same legal effect as rules adopted by the Superintendent. *Imagineering, Inc. v. Superintendent of Insurance*, 593 A.2d 1050, 1052 (Me. 1991).

[5] Although there is also a legal distinction within the transportation industry between "contract carriers" and "common carriers," that distinction is not relevant to the criteria for classifying trucking operations under the Uniform Classification System.

[6] The March 31 audit adjustment encompasses not only all of the charges Palco has disputed for the 2002–03 policy, but also an additional increase in premium because Palco's final clerical payroll was lower than originally estimated but its final operations payroll was higher than originally estimated. Palco has not contested the merits of this adjustment, only its timeliness.

[7] *See Charles H. Roberts, Inc. v. Commercial Union Insurance Co.,* No. INS-95-11 at note 2. *Cf. Crowe Rope Industries, LLC v. Wausau Underwriters Insurance Co.,* No. INS-00-11 (finding validity of final audit bill questionable under Rule 470 when mailed within deadline but to wrong address); *Kevlaur Industries v. MEMIC,* No. INS-94-12 at 3–4 (Me. Bur. Ins. Aug. 9, 1994) ("a carrier cannot fairly claim to have 'determine[d] that it is necessary to effect a classification(s) change,' within the meaning of the [NCCI rating plan], until that determination has been finalized by notifying the employer of the determination")

[8] American Interstate argues that we can rely on economic incentives to ensure that insurers will usually bill promptly. That argument proves too much, since those economic incentives exist independent of the Rule.

[9] Which according to Ms. Russell's affidavit was actually $33,430, not $34,400.

[10] Which, as discussed above, American Interstate did not do until the following spring.

[11] Although the policy covers both Maine and New Hampshire operations, it was issued in Maine to an employer with a principal place of business in

Maine. Therefore, the entire policy falls within the Superintendent's jurisdiction and within the scope of this proceeding.