

COLONIAL PLASTERING
v.
MAINE EMPLOYERS' MUTUAL
INSURANCE COMPANY,
et al.

Docket NO. INS-97-23

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DECISION AND ORDER

Robert Crawford, doing business as Colonial Plastering, has filed a petition with the Superintendent, pursuant to 24-A M.R.S.A. §§ 229, 2320(3), and 2908(6), contesting the cancellation of Colonial Plastering's workers' compensation insurance policy by the Maine Employers' Mutual Insurance Company ("MEMIC") for nonpayment of premium. Mr. Crawford admits that he has not paid the full premium billed by MEMIC, and objects to the cancellation on the sole ground that he considers his business to have been inappropriately classified for rating purposes. For the reasons set forth below, MEMIC is ordered to reclassify the business as requested, and to reinstate the policy.

The issues raised in this proceeding are so broad in scope, however, that any individualized remedy at the individual employer level can only be a patchwork expedient. In the short term, in addition to the relief I am ordering here, the Bureau will be issuing a separate order to NCCI to reclassify other employers in the same "Plastering — NOC" classification, if any remain. In addition, NCCI will be directed in the context of the advisory loss cost review process to work with the Bureau and interested insurers on developing a more accurate and equitable method of rating classifications with no statistically credible Maine experience.

Colonial Plastering does "residential veneer plastering," a technique which involves applying coats of plaster over a special type of gypsum wallboard. Veneer plastering contractors are classified within Code 5480, "Plastering — Not Otherwise Classified" by MEMIC, as directed by the National Council on Compensation Insurance ("NCCI"), designated pursuant to 24-A M.R.S.A. § 2382-B as the advisory organization responsible for the administration of the uniform workers' compensation classification system.

In the 1996–97 policy year, Colonial Plastering's premium rate was \$29.18 per \$100 of payroll. Then Mr. Crawford was notified that the rate would increase to more than \$40 for 1997–98, although premium rates for the average Maine employer were decreasing. Mr. Crawford requested reassignment to Code 5445, "Wallboard Installation," and refused to pay the additional premium. MEMIC issued a cancellation notice, Mr. Crawford requested a hearing, and the Superintendent held an adjudicatory hearing on February 3, 1998.¹

There is no serious dispute that Colonial Plastering's operations fall within the description of the "Plastering – NOC" code in the *Scopes Manual*.² However, there was also extensive testimony describing the similarities and differences between veneer plastering and drywall installation, and there is enough similarity that the "Wallboard Installation" code could also reasonably be applied to this business if no other code better described the work. Indeed, there is uncontested testimony that most plastering work in Maine is performed by drywall contractors, who have the benefit of the Code 5445 premium because they do more drywall work than plastering work.

Because I am ordering the two classifications merged for Maine rating purposes, I am not deciding at this time whether Colonial Plastering is more appropriately classified as Code 5480 because it more closely describes the particular operations, or more appropriately classified as Code 5445 because Code 5480 is an NOC classification and a more specific classification is available.

Although Mr. Crawford's testimony was directed towards demonstrating that veneer plastering over gypsum lath does not involve the kinds of risks that make "Plastering–NOC" so much more hazardous than "Wallboard Installation," I find that the problem really runs much deeper — there is no reason to believe that plastering is in fact a more hazardous occupation than drywall installation, and may well be less hazardous.

The high rate for plasterers in Maine appears to be a statistical anomaly based primarily on a handful of serious claims occurring several years in the past. NCCI provided a page of loss cost data showing how plasterers' pure premium for 1996 was calculated based on experience in the five-year period from June 1988 to May 1993.³ One particularly striking figure was the total Maine payroll for this classification: in the most recent year, 1992–93, the combined payroll for all employers in the State in this classification was \$64,406. (The preceding year it was even lower.)

This is such a minuscule experience base that for many classifications, a single employer with a payroll of \$64,406 would be considered too small to experience-rate. The year-to-year fluctuations in this particular classification have been dramatic. Although the indicated pure premium, based on Maine experience in the two most recent years, would be \$0.99 per \$100 for 1992–93 and only 8¢ per \$100 for 1991–92, there were almost \$500,000 of incurred losses in 1990–91 on a payroll of \$95,799 — an indicated pure premium of \$519.24 per \$100! During that year, three serious claims were filed, approximately half the number of workers in the entire State who were then classified as plasterers. Primarily as a result of those claims and one other serious claim in the preceding year, the 5-year Maine-only pure

premium was \$93.64 for every \$100 of payroll. Meanwhile, the "national relativity" method (which assumes that the safety and hazard of different occupations, relative to one another, is essentially the same in Maine as it is in other places) indicated a pure premium of \$12.41.

Perhaps those three serious claims in 1990–91 were the predictable result of plastering operations in Maine which were considerably more perilous than those typically assigned that classification in other states. On the other hand, perhaps they were the result of a single auto wreck involving a plastering crew . There is insufficient evidence at this point to know the answer. All that I can find on this record is that NCCI has not provided sufficient statistical support to justify the 16% credibility weighting it gave the \$93.64 pure premium figure, and that combining the plastering and drywall codes on a state special basis would provide a better predictor of the risk under NCCI's current methodology. It is worth noting again that most plastering work in Maine is already done under the drywall code, and that the unusual rating differential between these two codes encourages employers to do whatever they can to avoid the "plastering" label and thereby aggravates the "orphan" status of Code 5480.

I recognize that a full analysis of the validity of this premium rate would require extensive evidence that is not yet on the record. Such evidence is probably better considered in a less adversarial forum, and relates more to the issue of improving the loss cost methodology than to the determination of a reasonable premium rate for this particular employer. For this reason, I recessed the hearing rather than closing it, to allow the parties an opportunity to explore settlement and to allow them an opportunity to present further evidence if they chose to litigate the matter. The parties have advised, however, that they are unable to reach agreement in the absence of a written Decision and Order. If any party believes such an evidentiary presentation is necessary before a final decision can be made as to Colonial Plastering's premium rate, I will reopen the proceeding to take additional evidence upon the filing of a timely motion for reconsideration.

It is therefore *ORDERED* that MEMIC shall reclassify Colonial Plastering under Code 5445, Wallboard Installation, retroactive to April 9, 1997, the effective date of the current policy, and shall withdraw its notice of cancellation as long as Mr. Crawford pays, on or before April 1, any premium that may still be overdue after MEMIC revises its bill in accordance with this Decision and Order.

This Decision and Order is a final agency action within the meaning of the Maine Administrative Procedure Act, unless it is vacated, modified, or superseded following a timely motion for reconsideration or amended filing. It is appealable to the Superior Court in the manner provided in 24-

A M.R.S.A. § 236 (Supp. 1997) and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice, or may file a motion for reconsideration pursuant to Bureau of Insurance Rule 350, § 19, within twenty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by the Superintendent's decision may initiate an appeal on or before March 25, 1998. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

¹ Bureau of Insurance Financial Surveillance Attorney Robert Alan Wake was designated by the Superintendent pursuant to 24-A M.R.S.A. §210 to hear and decide this case.

² The publication formally entitled Scopes of Basic Manual Classifications, issued by NCCI as a supplement to its classification plan. The Superintendent has taken official notice of both the NCCI Basic Manual, filed by NCCI and approved by the Superintendent pursuant to 24-A M.R.S.A. §2382-B(3), and the Scopes Manual.

³ "Pure premium" is the part of the premium that represents expected losses, and does not include the insurer's projected expenses or the insurer's profit margin.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

APRIL 16, 1998

**ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER**