

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

In the Matter of)	
)	
APPEAL OF EASTON ROOFING, LLC,)	Docket No. 4780-APP
)	

FINAL ORDER

On March 15, 2016, the above captioned matter comes on for hearing. The Petitioner, Easton Roofing, LLC (“Easton”) appeared in person by Joe Speicher and through counsel, Mr. Matthew Crowley. The Respondent, Technology Insurance Company, (“Technology”), a subsidiary of Amtrust North America (“Amtrust”) appeared through counsel, Mr. David Kraft. The National Council On Compensation Insurance (“NCCI”), while not a party, appeared by telephone by Tim Hughes and Vicki Dorsey. Hearing Officer John Wine, Assistant Commissioner of Insurance presided over the matter and was assisted by Grace Lancaster and John Dowell, staff attorneys for the Kansas Insurance Department.

Procedural Issues

This matter comes before the Hearing Officer as a result of an Appeal by Easton to the Kansas Insurance Department of a NCCI decision concerning the reclassification of Easton employees for workers compensation insurance purposes. The Appeal of the classification comprises the basis for the Hearing Officer’s decision.

The Commissioner of Insurance has jurisdiction to hear this case under K.S.A 40-960. The hearing shall be governed by K.S.A 40-2115 and K.S.A 40-281.

The following action is appropriate to promote the security and integrity of the insurance business and allow employees and employers to have proper workers compensation insurance for their business.

Issues

1. Should NCCI Code 5551 or Code 8742 be applied to the Easton employees, who are the subject of this matter?

2. Was Rule 1-A(1) violated when NCCI Code 5551 was applied to the Easton Employee's but not other employees in the same field or occupation?

3. Did Technology violate Rule 1-F by retroactively increasing the premium after the close of the policy term?

The Parties Have Submitted the Following Stipulations:

1. The Petitioner is Easton Roofing, LLC, herein after "Easton", a duly authorized Kansas Company located at 7323 Belinder Avenue, Prairie Village, Kansas 66208.
2. The Respondent is Technology Insurance Company, hereinafter "Technology", an authorized workers compensation insurance carrier in the state of Kansas.
3. Easton is a roofing broker who contracts with homeowners, property management companies and business owners for the installation, repair, and maintenance of roofs. Easton also assists insurance adjusters in determining the extent of damage, scope of work and pricing for roofing work. Easton performs work primarily in the Eastern Kansas and Western Missouri areas.
4. Easton contracted with Technology for workers compensation insurance for the policy period of 04/11/14 to 04/11/15.
5. Technology issued a policy for workers compensation insurance, Policy No. TARKS 6766200, to Easton through the assigned risk pool.

6. On 04/11/14, Easton, through its insurance agent, submitted to Technology a request for increase in payroll of employees within class code 8742 of \$75,000.00. On 08/26/14, Easton submitted another request to Technology for increase in payroll of employees within class Code 8742 of \$120,000.00.
7. Each of these two requests were approved by Technology and premiums based upon those requests were paid by Easton in full in February 2016, upon agreement with Technology. Policy Endorsement 2, states premiums were estimated and subject to audit whereas Policy Endorsement 1 does not make such disclosure.
8. On 05/25/2015, Technology performed a post-policy audit of Easton's payroll. That audit lists four (4) employees of Easton as "Salespersons" under Code 8742 and having an audited payroll of \$113,728.00.
9. Subsequent to the submission of the audit report, by the auditor, to Technology, Code 8742 for Easton's salespersons was changed to Code 5551 Roofing.
10. This unilateral change in the code classification on the audit by Technology resulted in an increase premium being charged to Easton in the amount of \$22,713.00, which has subsequently been paid by Easton.
11. To obtain the necessary information for a bid, the salesperson:
 - a. Meets with the property representative to discuss the nature and scope of the work sought; any particular problem or failure of the roof; the materials to be used; the timing and nature of the work and; applicable warranties.
 - b. The salesperson measures the roof primarily utilizing the computer based satellite programs to obtain the dimensions and structure.

12. Salespersons for Easton utilize Eagleview and Sky Measure computer based satellite programs to obtain the measurements for a roofing bid.
13. Upon obtaining the necessary information for the bid, that information is input into a computer program by the salesperson to complete a formal bid.
14. Salespersons for Easton do, on occasion, access a roof for which a bid has been requested. In accessing a roof, the sales person utilizing no roofing materials or tools other than a tape measure, writing utensil, clipboard, ladder, and a cellphone by which to take pictures, if necessary.

Conclusions of Law

This administrative body will take up the three issues in the order presented above.

- A. The first issue is whether the Easton employees, who are the subject of this matter, were properly reclassified under NCCI Code 5551.**

NCCI, in its original opinion, found the following:

The percentage of time an employee is exposed to the hazards of an operation is not the basis for determining the assignment of a standard exception classification, including Code 8742. In a related example, if a clerical office worker, spends 95% of their time in an office setting, performing office clerical work, and five percent of their time exposed to the operative hazards of their business, this worker is not classified to Code 8810-Clerical Office Employees NOC. Rather the worker is assigned to the governing classification of the business. In the case of Easton Roofing, there are two sales staff that spend the vast majority of their time performing sales duties that qualify for Code 8742. However, the sales staff do spend a small amount of time exposed to the hazards

associated with a roofing company; that of mounting the roof to complete the bid estimate.

K.S.A. 40-960 directs the Commissioner of Insurance to do no more than affirm or reverse the decision of the rating organization. In this case, that rating organization is NCCI. While this particular code might not be good public policy, it is not proper for this administrative body to issue orders contrary to the already established rating guidelines. The current NCCI guidelines dictate that an employee who spends any time on a roof, no matter how brief, shall be assessed a premium based on Code 5551. Since the employees at issue here did spend time on the roof, as stipulated by both parties, they were properly classified under Code 5551.

B. The second issue is whether classifying these employees under Code 5551 violates Rule 1-A(1) of the Basic Manual.

Rule 1-A(1) states: the purpose of the classification system is to “group employers with similar operations into classifications so that (1) the assigned classification reflects the exposures common to these employers and (2) the rate charged reflects the exposure to loss common to those employers”. This agency lacks jurisdiction to rule on this issue. As stated above, KSA 40-690 restricts the Commissioner’s ability to rule on issues that were not contained in the original NCCI order. The record reflects a lack of argument on this issue at the NCCI quasi-administrative level, and this agency will not make a ruling on this issue.

C. The third and final issue is whether Technology violated Rule 1-F by retroactively increasing the premium after the policy term had ended.

Rule 1-F states: Corrections in classifications that result in an increase in premium, must be applied as follows

1. If the correction in classification is effective during the first 120 days of the policy term, then the correction is applied retroactively to the inception of the policy.
2. If the correction in classification is effective after the first 120 days of the policy term, but before the final 90 days, then the correction is applied as of the date the company discovers the cause for that correction.
3. If the correction in classification is effective during the last 90 days of the policy term, then the correction is applied only to a renewal policy, if any.

Petitioner argued that even if NCCI code 5551 was the proper code, the premiums should not have been assessed retroactively but only in conjunction with a renewal policy, if any. Respondent's answer to this argument is two-fold. Firstly, it is argued that this issue was never raised before the hearing held by this office. Secondly, the reclassification was due to an omission by the insured, or the failure to notify the insurance carrier of the true nature of the employee's work.

There is no need to address the second argument because the first is persuasive. There is no evidence in the record that this argument was originally heard by the NCCI panel. Furthermore, Petitioner failed to properly appeal the issue to this administrative body. In the Pre-Hearing Questionnaire, which is this agency's substitute to traditional pleadings, the only issue asserted was whether the employees were "properly classified under Code 8742-Salespersons or Collectors-Outside." Neither the Respondent nor this administrative body was notified of the argument prior to the hearing. Since the issue of whether Rule 1-F was violated was not originally appealed, it cannot be taken up by this agency at this time.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the order issued by NCCI with regard to the proper classification of NCCI employees is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that issue two is denied at this time.

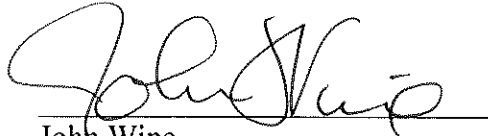
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that issue three is denied at this time.

NOTICE OF RIGHTS

Pursuant to K.S.A. §77-601 et seq., Easton Roofing, LLC is entitled to judicial review of this Final Order. The petition for judicial review must be filed within thirty (30) days of service of this Final Order (plus three (3) days for services by mail pursuant to K.S.A. §77-531). In the event Easton files a petition for judicial review pursuant to K.S.A. §77-613(e), the Agency Officer to be served on behalf of the Kansas Insurance Department is:

Diane Minear, General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

IT IS SO ORDERED THIS 18th DAY OF APRIL, 2015, IN THE CITY OF TOPEKA, STATE OF KANSAS.



John Wine
Presiding Officer

Certificate of Service

The undersigned hereby certifies she served a true and correct copy of the above and foregoing **FINAL ORDER** on this 19th day of April, 2016, by causing the same to be deposited in the United States Mail, first class postage prepaid, addressed to the following:

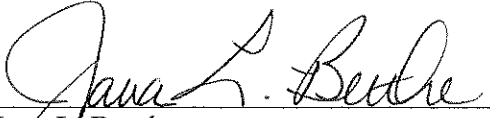
Matthew S. Crowley
Crowley Law Office, LLC
2930 SW Wanamaker Drive, Suite 9
P.O. Box 3860
Topeka, KS 66614
Attorney for Petitioner

David A. Kraft
David A. Kraft & Associates, LLC
4110 Baltimore Avenue
Kansas City, MO 64111
Attorney for Respondent

Victoria N. Dorsey
Managing Attorney
NCCI Holdings, Inc.
901 Peninsula Corporate Circle
Boca Raton, FL 33487-1362

And hand-delivering to the following:

Grace Lancaster
WCF Manager
Kansas Insurance Department
420 SW 9th Street
Topeka, KS 66612



Jana L. Beethe
Legal Assistant