

STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re: Appeal of Serenity Power Plus, Inc.

Docket No.: Ins 04-041-AP

FINDINGS AND ORDER

Facts and Conclusions

A hearing was held before the Department, with David A. Withers, Property and Casualty Actuary, serving as the hearing officer, at 9 a.m. on Wednesday, June 8, 2005 concerning the appeal of Serenity Power Plus, Inc. ("Serenity") with respect to the assignment of the single workers' compensation classification code ("class code") 7228 to its business operations in New Hampshire for the purposes of policy periods commencing on or after October 2, 2003.

Appearing on behalf of Serenity were Mr. William Hayes, Jr. of the Fred C. Church Insurance Agency and Ms. Christine Ward and Mr. Daniel C. Pratt of Serenity.

Appearing on behalf of NCCI Holdings, Inc. ("NCCI") was Mr. Rick Ekstrom, Inspector and Attorney Steven Lauwers of Rath, Young & Pignatelli, P.A., NCCI's outside counsel.

Appearing on behalf of Liberty Mutual Insurance Company ("Liberty") was Daniel Stolworthy, Field Audit Manager.

An audiotape of the hearing was made. All parties were heard in full at the hearing, which lasted approximately two hours. The record of the hearing was also kept open for one week, until the close of business on Wednesday, June 15, 2005, for the parties to file closing arguments, draft orders and additional information. In addition, in an e-mail sent by Mr. Withers on July 28, 2005, follow-up questions were posed to Serenity, NCCI and Liberty. All parties responded to the specific questions addressed to them, on or before August 15, 2005.

The Department has now reviewed all of the evidence and arguments submitted by the parties at the hearing and afterward in the documents identified in the preceding paragraph. This review also included a review of the applicable rating rules and classification codes at issue, the decision of the New Hampshire Workers' Compensation Classification and Rating Appeals Board ("Board") being appealed by Serenity, along with the records of the proceeding before the Board, including the relevant inspection reports of NCCI.

The following facts and observations were key elements of the final decision reached:

1. There are clearly two well-defined and mostly independent components of Serenity's business – the pickup and delivery of palletized pharmaceutical supplies and paper supplies, using tractor-trailer trucking, from distribution centers in Massachusetts to two locations owned and operated by Serenity in New Hampshire, and the local delivery of individual packages and supplies to businesses and customers throughout New Hampshire.
2. There was a significant amount of confusing information being supplied to Serenity throughout the issuance and auditing of policies associated with earlier policy terms as to what the correct classification was and what was the basis for that determination.
3. The NCCI definition of classification 7231, in effect during the policy periods in question, requires that the risk be engaged exclusively under contract in local delivery of mail, packages, parcels or packages limited to 100 pounds or less. There is also a requirement that there be a delivery tariff or charge allocable to the individual envelope, parcel or package.
4. NCCI and Liberty representatives testified as to the significance of, and the reliance on the word “exclusively” in the application of class code 7231.
5. NCCI rules do allow for more than one basic classification if certain requirements are met, one of which is a theoretical condition of “being able to exist as a separate business if the insured's principal business in the state ceased to exist”.
6. There appears to be little disagreement that there are two components of Serenity's operation. There is disagreement among the parties as to whether or not one could exist without the other, despite the fact that Serenity operated in just that manner for a period of time.
7. Serenity currently does not bill its customers on a “per-item” basis. However, based on information provided along with general common sense, it appears that Serenity could do so.
8. Testimony was provided that UPS is a good example of an entity that qualifies for code 7231 (because it does bill its customers on a “per-item” basis). However the use of UPS as a good example also supports the perspective that Serenity's operations could be divided. At some point UPS “bundles” the individual packages and parcels so that they can be easily moved around the country and the world, before being “unbundled” and resorted for individual delivery in a different locale. Surely if operations of UPS can be divided, Serenity's could as well.
9. NCCI acknowledges that early in 2005, they developed and filed revised requirements for class 7231, to be effective November 1, 2005. After that date, assuming that Serenity has changed their billing procedures, NCCI indicated that they would likely divide the operations of Serenity into two parts, using both 7231 and 7228 as operative class codes. Of special note is that Serenity would only

- have to have revised billing procedures in place; no other changes to the operation as has existed in the past or currently exists was identified by NCCI as a condition to the use of two basic classifications. The concept of “exclusively” as currently used and relied upon will no longer be applicable.
10. Given this change in NCCI perspective, there is little to support the belief that Serenity could not have been viewed as an operation that could be rated using more than one basic classification. Given that the elements of exposure to loss have been and remain unchanged – pickup and delivery of pallets from Massachusetts; unloading, separating and resorting individual packages; local delivery to businesses in New Hampshire – there was an appropriate compromise position available to NCCI and Liberty when this issue first arose in 2004.
 11. Serenity, as a consumer and insured, deserves to be the beneficiary of consistent application and interpretation by NCCI and insurers as to the appropriate classification of its operations. This applies to past as well as future policy periods.


Order

Based on the above Facts and Conclusions, I find that the appeal of Serenity has merit.

It is ORDERED that:

1. Serenity provides NCCI, Liberty and other insurers, if applicable, with payroll and any other requested and necessary information so that codes 7231 and 7228 can be used as the basic classification codes applicable to policy periods commencing October 2, 2003.
2. All workers’ compensation insurance policies issued to Serenity, commencing with the policy issued by Liberty effective October 2, 2003, reflect the use of two basic classifications 7231 and 7228.
3. Serenity implement and sufficiently document a revised pricing and billing system which complies with the requirements of code 7231, prior to the effective date of their next renewal policy.

Date: 8/24/05



David A. Withers
Hearing Officer