STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re: Customer Engineering Services

Docket No. 20-079-A

PETITIONER CUSTOMER ENGINEERING SERVICES REPLY TO RESPONDENT'S EXCEPTIONS TO PROPOSED DECISION AND ORDER

Petitioner, Customer Engineering Solutions, ("CES" or "Petitioner"), pursuant to New Hampshire Administrative Rule Ins 207.04(a)(2), files this reply to Respondent's, Mitsui Sumitomo Insurance USA, Inc. ("Mitsui" or "Respondent") exceptions filed on June 28th, 2021.

Introduction

This case concerns whether Respondent correctly classified Petitioner's employees to code 3724 during their past workers compensation policies effective 7/10/2015-16, 7/10/2016-17, 7/10/2017-18, and 7/10/2018-19, or whether different classification codes, 5191 and 5192, should apply to certain of CES's employees based in New Hampshire during these policy periods. CES appealed to the New Hampshire Department of Insurance was made after an adverse ruling by the NCCI New Hampshire Appeals Board. Parties submitted a total of sixty-nine exhibits into evidence, and a two day hearing was held on March 22nd and March 24th, 2021, with the testimony of four witnesses before the New Hampshire Department of Insurance. After Proposed Recommended Orders were submitted by the parties, Hearing Officer Michelle Heaton ("Hearing Officer") submitted a Proposed Decision and Order ("Proposed Decision"), dated June 9th, 2021, holding that Mitsui retroactively apply codes 5191 and 5192 to the disputed employees and policy years. Respondent on June 28th, 2021 submitted a list of ten exceptions to the Proposed Decision.

All but one of these exceptions have no merit, and the single exception that does -Exception #4- has no bearing on whether code 3724 was the correct classification. Mitsui based their other exceptions upon the unsupported assertion that the Hearing Officer was shifting the burden of proof or that Mitsui did not receive a breakdown of payroll records during the policy. The most critical issue of a classification code dispute is based upon employees job descriptions, and how these job duties relate to the NCCI classification codes. CES sent produced 430 pages of records (Exhibit 67) showing exactly what equipment each New Hampshire technician serviced during each policy period. It then grouped each type of equipment into a category and produced a payroll summary for each employee by type of equipment, broken by policy year and classification codes. (Exhibit 62.) Although Mitsui attacked these Exhibits at the Hearing, the Hearing Officer did not find much weight in these criticisms and dismissed them in footnote 118.

There was an abundance of material presented at the Hearing in March. All Exhibits were admitted into evidence by agreement, and the parties had ample time to discuss, present, and cross examine the witnesses. Under New Hampshire Administrative Rule Ins 207.04(4), it is the duty of the Hearing Officer to determine if the parties have met their burden of proof, by the weight of the evidence In this Hearing, the burden was on CES, as Petitioner, to meet the burden of the preponderance of the evidence. The Hearing Officer, after reviewing all of the exhibits, testimony, and relevant New Hampshire laws, concluded that Respondent Mitsui should be ordered to apply the new classifications to these prior audits. This Proposed Ruling should be largely adopted by the New Hampshire Commissioner of Insurance, and Mitsui should be ordered to apply codes 5191 and 5192 to these past policies.

Background

Petitioner, CES had been insured for its Workers Compensation policies with Respondent, for the policy periods of 7/1/15-16, 7/1/16-17, 7/1/17-18, and 7/1/18-19, which included coverage in the State of New Hampshire. Most of Petitioner's Technicians did no work on equipment that would be

classified to code 3724. Their time was wholly spent on equipment properly classified into codes 5191 and 5192. However, in those policy periods, the payroll for all of CES's Field Service Technicians ("Technicians") in New Hampshire had been placed into code 3724, with Mitsui's auditors not asking for a breakdown of duties or pay by classification code at the audits.

On June 24th, 2019, Petitioner requested dispute resolution through the National Council on Compensation Insurance ("NCCI") regarding the classification of those employees. On October 8th, 2020, a meeting of the New Hampshire Workers Compensation Appeals Board ("Appeals Board") heard the dispute regarding the classification codes. On October 14th, 2020, the Appeals Board issued a ruling, holding that code 3724 applied to CES's New Hampshire Field Service Technicians to these expired policy periods.

On November 13th, CES timely appealed the decision of the board to the New Hampshire Department of Insurance ("Department of Insurance"). On February 17th, 2021, both parties filed Pre-Hearing Statements and submitted exhibits. On February 25th, Hearing Officer Michelle Heaton issued a Prehearing Order, setting hearing dates for March 22nd and March 24th, 2021. On March 15, 2021, Joint Stipulations were filed by the parties, including the admissibility of all of Petitioner's and Respondent's Exhibits. The parties disputed whether there is sufficient evidence available to support the imposition of codes 5191 and 5192 in accordance with NCCI procedure manual rules, or if Code 3724 should continue to be used on these audits.

At the hearing, Petitioner presented the testimony of Jerry Hope, Vice President of CES, and Christian Fridholm, Vice President of Fujifilm North American Corporation. Respondent presented the testimony of Steven Zaeh, Vice President of Mitsui, and Catherine Tralha, Premium Audit Manager at Mitsui. By agreement, 69 Exhibits admitted into evidence by both parties. After the conclusion of the hearing, transcripts were received by both parties on April 9th, 2021. The parties timely filed Proposed Recommended Orders on May 10th, 2021, which were considered in the preparation of the Proposed Decision, as was the final hearing transcript filed with the New Hampshire Department of Insurance.

On June 9, 2021, the Hearing Officer issued the Proposed Ruling finding that code 5191 is the appropriate code that best describes CES's overall business in New Hampshire for work on commercial printers, that code 3724 is the appropriate additional operation code for the technician servicing commercial imaging equipment in an industrial setting, and that code 5192 is the appropriate interchange of labor code to apply for the servicing of vending machines. (Proposed Ruling p. 1). The Hearing Officer Proposed Decision ordered Mitsui to retroactively apply those codes to the policy years at issue. (*Id*. p. 22). On June 28th, 2021, Mitsui submitted ten exceptions to the Proposed Ruling. CES now submits their reply to the Exceptions submitted by Mitsui, and requests, with the exception of Mitsui's Exception #4, that the Commissioner accept the Proposed Ruling and Decision by the Hearing Officer.

CES's Reply to Exceptions

CES Reply to Exception #1

Mitsui has taken exception to the application of the burden and standard of proof applied by the Hearing Officer in the Proposed Decision and Order. This exception has no merit. As Respondent stated, the Hearing Officer applied the correct burden of proof, which is that CES had the burden, by the preponderance of the evidence, to prove that the Commissioner should overturn the NCCI New Hampshire Appeals Board's ruling. This is the standard that the Hearing Officer used and held that CES had met that burden of proof.

In their Exception #1, Mitsui claims that "the HO *seemingly* shifts the burden of proof to Mitsui, in direct contravention of the required legal standard." (emphasis added.) The Hearing Officer at no point shifted the burden of proof, and even Mitsui, in their exceptions to the Proposed Ruling, can find no instances where the burden was shifted. Instead, in Mitsui's Exception #1, Mitsui lists several instances where Mitsui failed to produce evidence to contradict the evidence submitted by Petitioner. That the Hearing Officer found that Mitsui found no evidence to contradict this evidence is not shifting

the burden of proof. It was merely holding that CES's arguments were persuasive, and that Mitsui did not rebut them.

Petitioner produced testimony and exhibits showing that classification codes 5191 and 5192 were the correct classification codes for the disputed employees. Mitsui contested that assertion, arguing that code 3724 remained the correct classification code. To be placed in code 3724, an employee of CES would have had to work industrial equipment that would belong in code 3724. (*See* Exhibit 6, code 3724, and Exhibit 59, Rule 2-G of the NCCI Basic Manual.) CES witness Jerry Hope testified at length regarding the duties of the contested employees, the types of equipment that they worked on, and why that worked belonged in codes 5191 and 5192. (Tr. Vol. I 19:2-26:2.) The examples listed in Respondent's Exception 1 on p. 5 are all examples of Mitsui failing to contradict the evidence presented by CES regarding the duties of the disputed employees. Mitsui did not present any evidence that these specific employees worked on the heavier equipment that would belong in Code 3724, which is what the Hearing Officer held in their Proposed Ruling.

Mitsui further argues that "the HO should have addressed whether CES presented credible evidence that code 3724 was not the appropriate classification, or at the very least engage in a balancing of the evidence presented." (Respondent's Exception #1, p.2.) The Hearing Officer, however, did discuss the credible evidence presented by CES at the hearing that codes 5191 and 5192 were the correct classification codes with the Hearing Officer's Legal Analysis section. On p. 16, the Hearing Officer describes the testimony of CES witness Jerry Hope and Christian Fridholm as *undisputed* that the servicing and repair of office equipment was the primary operations in New Hampshire. (Emphasis added.) On p. 16-17, the Hearing Officer goes into great detail on why the Texas inspection was persuasive, and on p. 20-21 the Hearing Officer describes the Aste data that had been presented to the Department. The Hearing Officer then discussed the criticisms made by Mitsui's witnesses upon those records, concluding that "Mitsui presented no evidence to demonstrate that the Astea data was

unreliable, that the data could not be verified, or that Mitsui took any steps to try to verify the information in the Aste Reports." (Proposed Ruling, p. 22.)

This analysis does not shift the burden. This is the Hearing Officer weighing the testimony presented to them, finding that the evidence presented by CES was persuasive, and that the evidence presented by Mitsui was not. There was no shifting of any legal burden, and the Commissioner should therefore reject Respondent's Exception #1.

CES Reply to Exception #2:

Mitsui's argument in exception #2 is a very unusual exception It argues that the Hearing Officer must reject their own findings based upon the evidence presented at the hearing because "CES presented no evidence that prior to the hearing in this matter, CES informed Mitsui of this distinction between retail/imaging and commercial graphics technicians." (Mitsui Exception #2, p. 7.) This is unusual because Mitsui had opportunity to cross examine Jerry Hope after his testimony that regarding whether these departments existed during the disputed policy terms. Jerry Hope testified as to the existence of different departments of the technicians. (Tr. Vol. I 18:21-19:11.) Upon review of the transcripts, there is no cross-examination as to when CES used different departments for their technicians. In the Proposed Ruling, the Hearing officer concluded that "[t]here was no evidence presented to indicate that the retail technicians in New Hampshire serviced any equipment in an industrial setting as contemplated by code 3724 or that the tasks on the retail equipment was in any way analogous to the service requirements for the commercial graphics equipment." (Proposed Ruling, pp. 17-18.)

Moreover, there was evidence presented that Mitsui knew that some of CES's technicians only worked on no equipment that belonged in code 3724. In New Jersey, Mitsui placed all of CES's technicians into code 5191 for the policy years in dispute. (*See* Exhibit 41 at 00068-69, Exhibit 42 at 00069-00070, Exhibit 43 at 00068-00069, Exhibit 44 at 0072-73.) When cross-examined about this classification of the New Jersey employees, Steve Zaeh testified that it was because the New Jersey employees were only working on smaller equipment. (Tr. Vol. II 160:1-4). The Texas inspection did

divide the employees into different departments and assigned those departments into different classification codes. (Exhibit 63 at 630008.) This was reflected in the Texas audit for the 2018-19 policy, wherein the technicians payroll was split between codes 5191 and 3724. (Exhibit 44 at 0100-00101.)

Finally, Mitsui's own witness testified on cross-examination that they understood that different departments worked on different types on equipment:

> Q.· Sure.· Did you understand that there were different departments that worked on different types of equipment?
>
> A: We were aware of that, yes.

(Cross Examination of Catherine Tralha, Tr. Vol. II 92:23-93:3.)

Yet Mitsui, in their Exception #2, claims that Mitsui had not been presented with the distinction between graphics employees and imaging employees. (Mitsui's Exception #2, p. 7.) This statement is not based upon the testimony presented at the hearing, as Mitsui's auditors did understand that there was a distinction between the departments.

For the above reasons, CES asks that the Commissioner reject Mitsui's Exception #2.

CES Reply to Exception #3:

In Mitsui's Exception #3, they argue that "no testimony proffered during the hearing supports the conclusion that Mitsui relied on or attempted to apply Rule 1-D-3-d." (Mitsui Exception #3, p. 9.) Instead, Mitsui argues, they relied upon Rule 1-D-3-c-4 in the classification of CES's employees. They argue that because Rule 1-d-3-d was not mentioned at the hearing that only rule 1-D-3-c-4 should be relied upon by the Hearing Officer, rather than Rule 1-d-3-d. This argument must be rejected. Rule 1-d-3 was presented as Exhibit 58, which includes both 1-D-3-d and 1-D-3-c-4. Code 3724 is a contracting classification code, and the code that Mitsui argues should apply to the insured. Although Mitsui framed its argument in terms of 1-d-3-c-4, under the NCCI rules, a policy with a contracting code is subject to code 1-d-3-d. Although Mitsui did not argue for the use of 1-d-3-d for an insured that it is arguing belongs in a contracting classification code, it is within the Hearing Officer's authority to use the correct

NCCI rules in their Proposed Ruling, particularly when those rules were presented as an Exhibit at the hearing. New Hampshire Administrative Rule Ins 207.04(c)(2) allows the final decision and order to be based on any evidence of record presented at the hearing. Exhibit 58 contained all of Rule 1-D-3 of the NCCI Basic Manual, including 1-D-3-D. The Hearing Officer relied upon the rule accepted into Evidence, and it is therefore with the bounds New Hampshire Administrative Rule Ins 207.04(c)(2) for the Hearing Officer to rely upon this rule.

For these reasons, and CES asks that the Commissioner reject Mitsui's Exception 3.

CES Reply to Exception #4

In their Exception #4, Mitsui takes exception to the Hearing Officer's conclusion that the employee's payroll should be "assigned to the state in which each job is located." (Proposed Ruling, p. 10. This exception CES agrees with, as this particular finding is not in accordance with NCCI rules or RSA 412:32. NCCI rules require that for employees travelling a different state than they are based out of, that their payroll should be assigned to their headquarters state. RSA 412:32(v)(d) provides for an exception to this rule, for employees that are hired for a specific job shall be assigned to the state in which the job is located. As Mitsui correctly notes in their Exceptions, "the New Hampshire field service technicians are continuously employed by the same employer (CES) and merely have projects that may require them to travel to other states. (Mitsui Exception #4, p. 11.) Instead, the employees should be assigned under RSA 412:32V(a) or RSA 412:32 III(a), which would assign the employee's payroll to the headquarters state. On this sole exception, CES agrees with Mitsui.

However, this exception does not have to do with the classification of the employee, but, merely the state to which that payroll should be assigned. Therefore, this exception does not affect the overall conclusion, or the assignment of classification codes to these employees.

CES Reply to Exception #5

In their Exception #5, Mitsui objects to the Hearing Officer's conclusion that Mitsui did not ask for all valid records. (Mitsui Exception #5, p. 11.) This exception is based on a misstatement of facts, and a misunderstanding of the Texas Basic Manual Rules.

Mitsui asks for Exception 5 because the Hearing Officer found Jerry Hope's testimony to be credible and found Steve Zaeh's testimony to be "unpersuasive." (Proposed Ruling, p. 22.) Such findings of credibility are, of course, within the scope of a Hearing Officer's authority. Mitsui's own auditor, Katherine Tralha, agreed that they had received information in Texas allowing a split of payroll between the classification codes. (Tr. Vol. II 97:15-21.) It is no surprise that the Hearing Officer found Steve Zaeh's testimony unpersuasive, when he testified that "[a]ll I do know is that we asked for a breakdown of payroll and we were never able to get it," (Tr. Vol. II 162:23-163:1), as he was contradicted earlier in the hearing by Katherine Tralha:

Q. And did you receive documentation allowing you to split the payroll between accounts?

A.· Yes.

Q.· And you accepted that documentation in Texas?

A.· Yes.

Q. And you split the payroll in Texas?

A.· Yes.

(Cross Examination of Katherine Tralha, Tr. Vol. II 97:15-21.)

Mitsui's exception #5 also misstates the Texas rules, regarding the splitting of an individual employee's payroll. Mitsui argues that "Texas does not allow for such division of payroll, but instead requires the entire payroll of employees who interchange to be assigned to the highest rated classification representing any part of their work." (Mitsui Exception #5, p. 14.) This is the general rule in Texas for Rule 2-G, but there are exceptions, including one that applies to code 3724. Attached to this Reply, as Exhibit A, is the Texas Rule 2-G in force at the time of these policies. Code 3724 is a contracting classification code. In Texas, for a contracting code like 3724, "[t]he payroll of an

individual employee, other than miscellaneous employees, may be divided between more than one classification when the employer is engaged in construction, erection, oil and gas field work, or stevedoring work." Although Texas would not allow a division of payroll between codes 5191 and 5192, because they are not contracting codes, such a division is allowed if Mitsui attempted to use code 3724.

Finally, the inspection was not introduced as a binding inspection upon New Hampshire, but as suggestive as to what the correct classification codes were in New Hampshire. (Tr. Vol. I 45:13-22.) The Hearing Officer accepted it as relevant evidence on that basis, rather than as a binding inspection.

For these reasons, CES asks that the Commissioner reject Mitsui's Exception #5.

CES Reply to Exception 6:

Mitsui objects to the Hearing Officers conclusion that where records exist "that document the actual time a technician spends working on vending machines classified under 5192, code 5192 should be applied instead of code 5191." (Proposed Ruling, p. 22.) This holding would allow for the use of the two codes that CES has argued should be used for these disputed employees. Mitsui argues in that their exception first that the hearing officer should not use the distinction between retail and imaging employees, and that there is "no evidence showing that records which 'document the actual time a technician spends working on vending machines' exist." (Mitsui Exception #6, p. 16.)

The first contention is discussed in detail under our Reply to Mitsui Exception #2. The second contention- that there is no evidence of records showing the time that a technician works on vending machine exists- is flatly contradicted by the record. As stated above, CES produced all of the Aste time records, showing every date that each employee worked in each time of equipment, totaling pages of records. (Exhibit 67.) CES then classified each type of equipment into categories, including Vending Machines and Kiosks that it placed into code 5192. These records show the total time spent by employee and policy year that they spent working on vending machines and kiosks. (Exhibit 62.) These records were found to be credible by the Hearing Officer, and the Hearing Officer found that Mitsui

presented “no evidence to demonstrate that the Astea data was unreliable, that the data could not be verified, or that Mitsui took any steps to try to verify the information in the Astea report.”. (Proposed Ruling, p.22.)

In the face of all of these records, and of the Hearing Officer’s findings, Mitsui claims that “no evidence showing that records which ‘document the actual time a technician spends working on vending machines’ exist.” (Mitsui Exception #6, p. 16.) The records showing the actual time each technician spent working on vending machines were admitted into evidence, and found to be credible by the Hearing Officer.

For these reasons, CES asks that the Commissioner reject Mitsui’s Exception 6.

CES Reply to Exception #7:

Mitsui takes exception to the Hearing Officer’s reliance and weight given to the NCCI inspection in Texas. As discussed in CES’s Reply to Exception #5, the inspection was not introduced as a binding inspection upon New Hampshire, but as suggestive as to what the correct classification codes were in New Hampshire. (Tr. Vol. I 45:13-22.) The Hearing Officer gave it “the weight it is due.” (Tr. Vol. I 46:11-16.) The Hearing Officer focused on New Hampshire and ensured that the testimonial evidence presented with the Texas inspection was only relevant to New Hampshire. (Tr. Vol. I 46:13-19.) The Hearing, in their Proposed Ruling, concluded that while the inspection was specific to Texas employees, the “service and equipment are very similar to the services provided by New Hampshire technicians.” (Proposed Ruling, pp. 16-17.) Throughout the analysis of the inspection on pp.16-17, the Hearing Officer continually brought the discussion back to the duties and equipment done in New Hampshire. The same types of equipment are serviced in New Hampshire, as are serviced in Texas during the disputed policy terms. (Tr. Vol. I 48:6-14.) The inspection was relevant as to the duties and classifications of CES technicians, and the Hearing Officer relied upon it as it related to the duties and operations of the New Hampshire employees. Mitsui does not object to the relevance of this inspection- it clearly is relevant to how this type of employee should be classified under the NCCI Scopes Manual-

merely that the Hearing Officer gave it "more weight than it is due." (Mitsui Exception #7, p. 17.) Giving weight to admissible evidence is precisely the duty of the Hearing Officer.

For these reasons, CES asks that the Commissioner reject Mitsui's Exception #7.

CES Reply Exception #8:

Mitsui takes exception to the Hearing Officer's conclusions regarding the Astea data. In the proposed ruling, the Hearing Officer concludes that "that the Astea data was unreliable, that the data could not be verified, or that Mitsui took any steps to try to verify the information in the Astea reports." (Proposed Ruling, p. 22.) In its argument in Exception #8, Mitsui's shifts what is being argued about to discredit the Hearing Officer's conclusion. The Hearing Officer was speaking about the Astea data contained in Exhibit 67. In preparation for hearing, Mitsui prepared several exhibits attacking the payroll summaries in Exhibit 62, which is a fundamentally different document than Exhibit 67. At the Hearing, Mitsui's witness did attack the Astea data, saying that "I'm pretty confident this didn't exist when we wrote the insurance for CES." (Tr. Vol. II 142:1-3.) The Hearing Officer reasonably rejected this argument, finding it "incredible to believe that CES and Fujifilm would create years' worth of detailed job data for every job worked by a CES technician." (Proposed Ruling, p. 22). This is a reasonable conclusion, as the assertion was not supported in Mr. Zaeh's testimony by much more than his confidence.

Mitsui did, however, produce exhibits attacking Exhibit 62, which used the Astea data to calculate an employee's pay between the classification codes. Exhibit 51 shows a long list of differences between Exhibit 62 and the material presented to the NCCI New Hampshire Appeals Board, almost all of which are differences of small amounts. These differences were explained in the direct testimony of Christian Fridholm, who had created Exhibit 62. The majority of the differences were caused by a rounding difference, wherein Christian Fridholm rounded the hourly wage to three or four decimal points instead of two. (Tr. Vol. I 161:6-11.) In their Exception #8, Mitsui also attempts to make much of a difference in the amount of time spent by Lauren Liberge on Kioks during the 2015-16

policy and cites to testimony on cross-examination by Jerry Hope that there was a great difference. (Mitsui Exception #8, p. 23.)

Mitsui, however, does not mention the reason for the difference that was explained in the hearing by Christian Fridholm. In the NCCI board material, the Kiosk time for that year had been mistakenly assigned to code 5191. In the preparation of Exhibit 62, Christian Fridholm corrected that mistake. (Tr. Vol. I 160:10-161:5.) From this minor correction, Mitsui attempts to spin a narrative of unreliability of note only Exhibit 62, but also the Astea data. However, as the Hearing Officer correctly noted in footnote 118, "Any miscalculations or errors in the payroll summaries do not necessarily equate to error in the underlying data or records."

Mitsui, in Exception 8, which was purportedly only an exception to the Hearing Officer's language on the Astea, then moves on to attacking Exhibit 61. This discussion is similar to the attacks presented at the hearing and dismissed by the Hearing Officer in the Proposed Ruling. Mitsui takes exception to CES's calculation of idle time, calling it in the exceptions as "wholly fictional." CES, however, was very clear in how it calculated the idle time of the employee. The uncontroverted testimony of Christian Fridholm established that the Astea system only picks up the time that the employees spend working on each type of equipment. (Tr. Vol. I 141:7-13.) The idle time was calculated using their totals hours worked at CES minus the time spent working on a particular piece of equipment. (Tr. Vol. I 156:4-17.) The additional time that employees worked not on a specific piece of equipment was included as idle time, and classified into the governing classification for that employee. (Tr. Vol. II 43:5-23.)

Finally, within Exception 8, Mitsui argues that "the Astea data was reliable and verifiable, it still fails to meet the requirements of NCCI Rule 2-G" as it does not provide payroll records for the employee. It is true that the Astea data does not provide such data, but the ADP data does provide hourly payroll information. Exhibit 61, accepted as evidence, combines those two pieces of information. The Aste data shows how many hours each employee worked on each type of equipment, the ADP

system provides their total and hourly wages, and Exhibit 61 combines that data to fulfill the requirement of Rule 2-G of the NCCI Basic Manual.

All of these arguments were made by Mitsui in the hearing in their cross examination of both Jerry Hope and Christian Fridholm. The Hearing Officer rejected them, and those findings should be accepted by the Commissioner.

For these reasons, CES asks that the Commissioner reject Mitsui's Exception #8.

CES Reply to Exception #9:

In Mitsui Exception #9, Mitsui objects to the Hearing Officer's use of 412.35 and 412.32, since they were not "ever referenced either statute in relation to this matter, the statutes are not relevant to his proceeding," (Mitsui Exception #9, p. 24), and that the conclusions the Hearing Officer drew from these statutes are contradicted by the record. *Id*. Mitsui has no basis for objecting to the application of a statute as relevant, and Mitsui is incorrect in regards to the conclusions drawn from 412.35.

New Hampshire Administrative Rule Ins 207.04 governs the Final Decision and Order, and what may be considered, and not considered by the Commissioner. 207.04(d) restricts the information that may be considered in the Final Order by the Commissioner. It states:

> d) No factual information received or known that is not evidence of record shall be considered in any final decision and order.

(New Hampshire Administrative Rule Ins 207.04(d))

There is no restriction within 207.04 that the Commissioner may not consider any relevant statute to the dispute. Therefore, it was not improper for the Hearing Officer to consider 412.35 and 412.32, if they are relevant to the proceedings.

Section 412:35 of the New Hampshire Code relates to the auditing of workers compensation policies. It states, in part, that "A final premium shall be charged based upon actual exposure existing during the term of the policy coverage." (412:35(1).) The statute on the audited of a workers compensation is, of course, relevant to the proceedings, and that the insurer must charge for the correct exposure. The Hearing officer correctly concluded that exposure included assigning the correct

classification code to the insured. (Proposed Ruling, p. 15) This is in line with the terms of the workers compensation policy section 5-B, which require that an insurer correct the classification codes at the audit if they have used the incorrect classification codes. That section states that "[i]f your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy." (Exhibit 65 at 650005.) Classification codes are therefore included within exposure under these policies, and the Hearing Officer was correct in their reliance upon this statute. The Hearing Officials reliance on 412.32 is discussed in CES Reply to Exception #4, *supra*, and a different section of 412.32 should apply than the section the Hearing Officer relied upon.

Mitsui goes on in Exception #9 to make some additional statements that are not supported in the record or in the terms. They state that "there is no evidence establishing that Mitsui" shirked any of its duties to conduct a proper audit. They misstate the Hearing Officers findings on p. 15 of the Proposed Ruling. Mitsui states that it "does not contend that it may shirk any of its duties to conduct an appropriate payroll audit because CES continued to renew its policy with Mitsui and failed to contest the classification code. (See PDO p. 15)." (Mitsui Exception #9, p. 25.) The Hearing Officer simply stated that "[a] any acquiescence by the insured does not excuse the insured from complying with the requirements of RSA 412:35." (Proposed Ruling, p. 15.) Mitsui claims that they have not argued that, but that assertion is contradicted by the record. Mitsui's attorney argued that "the policy and the NCCI rules do not require Mitsui to question whether it received CES's complete records or to seek additional records from CES, particularly when CES *makes no objection or challenge to any of the renewals or the premium audits.*" (Emphasis added.) (Tr. Vol. II 50:7-12.) Additionally, in a response to NCCI in this dispute, which was part of the materials presented the NCCI Appeals Board, Steve Zaeh stated:

> It is our position that since the change in classification code was discussed with the broker who we believe discussed it with the insured and *since they agreed with the change it would not be appropriate to change the classification code retroactively.* (Emphasis added.)

(Exhibit 66 at 660056.)

The statement in Mitsiu's Exception #9 regarding the duties under the audit, with its duty to apply the correct classification codes, is contradicted by both their attorney's statement to the New Hampshire Department of Insurance, but also Steve Zaeh's letter to NCCI dated August 13, 2019 as part of the Dispute Resolution Process.

The evidence instead shows that Mitsui used a loss rating system to classify CES, to achieve the desired amount of premium. Steve Zaeh flatly says so in the same letter to NCCI, which was written at the initiation of the dispute. In that letter, Mr. Zaeh begins his letter by saying:

> Due to the size of the CES account, and the number of losses, we loss rate the policy to determine the adequacy of the premium. Upon completion of our loss rating projection, we determined that the premium using class code 5191 was inadequate based on loss experience.

(Exhibit 66 at 660055.)

Mr. Zaeh stated frankly how they determined the classification code. It was not based upon exposure, but based instead on losses, and the amount of premium that Mitsui desired for the account. This is not in accord with NH RSA 412:35, which requires that the final premium be based on the actual exposure, not on the amount of premium that the insurance carrier desired to achieve. Mitsui's protestations to the contrary, it is clear from this letter how Mitsui assigned code 3724 to CES: the premium from code 5191 was inadequate, and they changed the class code to 3724 to increase that premium. (Exhibit 66 at 660055.)

The Hearing Officer's Reliance on NH RSA 412:35 was well placed. It, as well as the terms of the policy, requires that the insurance carrier base the classification code on the actual exposure of the insured, and not to achieve an "adequate premium." (Exhibit 66 at 660055.)

Therefore, For these reasons, CES asks that the Commissioner reject Mitsui's Exception #8 as it relates to NH RSA 412:35.

CES Reply to Exception #10:

The final exception to the Proposed Ruling is that the Hearing Officer accepted the testimony of Jerry Hope that "CES technicians do not deliver or move equipment and do not lift any equipment over 50 pounds." (Proposed Ruling at 9.)

In support of their exception, Mitsui states that CES technicians were working on heavier equipment. (Mitsui Exception #10, p. 26.) The parties are in agreement that even the imaging employees would sometimes service heavier vending machines and kiosks properly classified to code 5192. Jerry Hope merely stated that the technicians do not deliver or move the equipment over 50 pounds. Whether or not they lift any equipment is immaterial to classification code dispute, as a worker can install a vending machine and still be assigned to code 5192. The Scopes Manual entry for 5192 contains no such restriction, as code 5192 includes the installation, service, or repair of vending machines. (Exhibit 56 at 560001.) The Hearing Officer found Jerry Hope's testimony credible regarding the duties of the technicians, and the Commissioner should reject this section of Exception #10.

Exception #10 concludes with a statement that "the HO's subsequent conclusion in section 5.2 of the Legal Analysis that the risk engineering surveys 'do not provide any specifics that would support classifying the work performed under code 3724,' must also be rejected." (Mitsui Exception #10, p. 27.) This statement is bereft of any supporting statements or facts, and should be rejected on that basis alone. The Risk Engineering Surveys are included as Exhibits 8 and 9. Both are dated from before the inception of the disputed policy periods, and neither took place in the State of New Hampshire. The Risk Engineering surveys are not centered on classification codes. Exhibit 8 takes place in California, a state in which Mitsui assigned classification code 5191 on the disputed audits. (Exhibit 41 at 0016-0017, Exhibit 42 at 0017-0018, Exhibit 43 at 0016-17, and Exhibit 44 at 0016-17.) Exhibit 8's Survey took place in Texas, where an NCCI inspection would later assign the retail technicians to code 5191. (Exhibit 63.) As the Hearing Officer concluded, neither survey supports the classification of the work done by the disputed technicians to code 3724.

For these reasons, the Commissioner should reject this section of Exception #10.

Conclusion

Based on the record and indicated above, the Hearing Officer and the Proposed Ruling placed the appropriate burden of proof on Petitioner. With the exception of Exception #4, the arguments made by Mitsui in their Exceptions are without merit. The conclusions drawn by the Hearing were well supported by the record and the Hearing Officer applied the law correctly. As such, the Commissioner should accept the conclusions of the Hearing Officer's Proposed Ruling and Order.

Respectfully submitted this 8th day of July, 2021

/s Scott M. Priz
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CERTIFICATE OF SERVICE

I CERTIFY that this REPLY TO RESPONDENT'S EXCEPTIONS TO PROPOSED DECISION AND ORDER was electronically filed with the New Hampshire Insurance Department on July 8th, 2021 and that a copy was provided by email to the following:

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/s Scott M. Priz
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Exhibit A

Basic Manual—2001 Edition—TEXAS

State Rule Exceptions

Rule 2—Premium Basis and Payroll Allocation

Effective 01 Jun 2014 12:00:01

G. Interchange of Labor

Change Rule 2-G as follows:

Some employees, who are not miscellaneous employees, may perform duties directly related to more than one properly assigned classification according to Rule 1-D-3. An example is an employee who from time to time interchanges between operations subject to more than one classification. When there is such an interchange of labor, the entire payroll of employees who interchange must be assigned to the highest rated classification representing any part of their work.

Standard Exception Classification Codes 8810, 8742, 8809, and 7380 are not eligible for division of payroll under this rule.

Exceptions to Rule 2-G:

In order to qualify for the exceptions below, the employer must maintain accurate payroll records reflecting the type of work performed by each employee. An estimated or percentage allocation of payroll is not permitted. In the absence of daily records, use the highest rated classification authorized for the insured.

- The payroll of an individual employee, other than miscellaneous employees, may be divided between more than one classification when the employer is engaged in construction, erection, oil and gas field work, or stevedoring work.
- Employees performing part-time duties as a member of an aircraft flying crew may be subject to division of payroll between Code 7421 and other classifications.
- Executive officers of cotton gins during the ginning season must be assigned during the dormant season to the classification which is applicable to the actual operations in which such executive officer is engaged.
- Trucking operations, when conducted as a separate and distinct business from the employer's primary business, may also be eligible for division of a single employee's payroll.

NOTICE: Although the *formatting* of this online manual, including any state exceptions, may differ from the hard copy, the *content* is identical.

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