

**PERRY TRANSPORT, INC.**  
**v.**  
**MAINE EMPLOYERS' MUTUAL**  
**INSURANCE COMPANY, et al.**  
**Docket NO. INS-03-412**

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**DECISION AND ORDER ON  
RECONSIDERATION**

On August 25, 2003, I issued a Decision and Order on behalf of the Superintendent in this adjudicatory proceeding, denying the Petition of Perry Transport, Inc. on the ground that MEMIC had properly billed Perry Transport under the terms of the subject policies and that Perry Transport was not entitled to a retroactive reclassification of its operations for workers' compensation rating purposes.<sup>1</sup> On August 27, Perry Transport moved for reconsideration, requesting specific findings of fact and conclusions of law, and an order was issued granting the motion and establishing the procedures for further input from the parties on the questions presented. Timely statements were filed by Perry Transport and by MEMIC. Upon review of the evidentiary record and the parties' statements, the Decision and Order of August 25 is reaffirmed for the reasons set forth below, and is hereby incorporated by reference.

Perry Transport's motion presented the following three questions:

1. "Whether Perry Transport provided evidence at the hearing that its records from the time period in question were adequate to prove that Perry Transport was engaged in a business that could have been classified under section 5506 and that an insurer conducting an adequate audit of that information could have determined that from that information."
2. "A finding as to when the evidence showed that Petitioner first contested the erroneous classification and an analysis as to why that time period was not 'within a reasonable time after audit.'"
3. "Whether under insurance regulations, the insurer MEMIC or the insured Perry Transport had a duty to ensure that the proper classification was applied to the insured."

***1. Evidence Relating to Business Operations***

The first question raised by Perry Transport actually encompasses a number of disparate issues. The first – the adequacy of the records from the time period in question – is the simplest. Perry Transport provided ample, persuasive, and essentially unchallenged evidence that it has adequate records to reconstruct a separate payroll accurately for its asphalt operations during the time period in which it was covered by MEMIC.

Whether Perry Transport operated "a business that could have been classified" under Code 5506 during the period in question is not so straightforward. As noted in passing at the hearing, the entire business of Perry Transport, Inc. is part of the road building industry, and thus could have been classified under Code 5506 at all relevant times, but Perry Transport's prior insurer, Perry Transport's current insurer, and NCCI are in consensus that "Trucking" (Code

7228) is a better description of Perry Transport's aggregate-hauling operations, and I concur.

There remains the question of what the asphalt operations involve and how to classify them. Perry Transport provided the Superintendent with ample information explaining its role in the paving process. However, the supplemental trucking questionnaire submitted with the initial MEMIC application by Perry Transport, Inc. asks what goods the applicant hauls, and the questionnaire says simply "sand and gravel." Although Perry Transport has pointed out that this questionnaire is signed only by the producer, with the space for the applicant's signature left blank, there is no evidence suggesting that the questionnaire was filled out without Mr. Perry's knowledge and approval. I find the questionnaire to be reliable evidence within the meaning of 5 M.R.S.A. § 9057(2), and I find it more likely than not that despite the lack of a signature on the questionnaire, the questionnaire and the other application materials – which say nothing about asphalt – are a fair summary of conversations between the producer and qualified representatives of Perry Transport. Nevertheless, based on the record before me I also find credible the unchallenged testimony credible that there has been no material change since 2000 in the nature of Perry Transport's asphalt operations, and that the failure to mention them specifically in either MEMIC application was because both Perry Transport and its insurance producers were unaware at the time that this information might be material to the classification of the risk.

As to how to classify these operations, I had noted in the initial Decision and Order that there will inevitably be situations where reasonable underwriters may disagree as to which classification best describes a particular operation, and I find that this is one of those situations. Therefore, if both insurers were entitled to business judgment deference, the answer would be "The marketplace works. They're both right, and the employer is entitled to have the new classification take effect as soon as the employer switches carriers, as agreed in the contract."

A key legal issue in this proceeding is whether that result is altered by laws requiring insurers to adhere to a uniform classification system, 24-A M.R.S.A. § 2382-B, and contractual provisions incorporating that uniform classification system by reference. The purposes of requiring a uniform classification system include providing an objective, nondiscriminatory standard for ratemaking that can protect employers with limited coverage options, and establishing a basis for ratemaking and statistical reporting that allows meaningful comparison of data from different insurers. To implement the uniform classification process, the Superintendent of Insurance and the designated advisory organization, NCCI (subject to the Superintendent's review), are both authorized to resolve disputes and to determine the single classification that best describes a given employer's operations.

Nevertheless, the use of a uniform classification system only diminishes the role of the market in the classification process; it does not eliminate it entirely. Uniformity can coexist with a certain degree of flexibility. The integrity of the system is not damaged if borderline cases are occasionally resolved in different ways, no more than the integrity of federal law is undermined by the occasional unresolved circuit conflict. The existence of an authoritative dispute resolution mechanism does not mean that every question needs to be resolved through that mechanism.<sup>2</sup> Here, no party with standing disputes Perry Transport's current classification, and there is no claim that similarly situated employers are currently being treated in a discriminatory fashion. Therefore, there is no need to issue a definitive ruling that one of Perry Transport's insurers reached the correct result and the other reached an incorrect result. The record in this case, with no active participation by NCCI, and no testimony from Rick Ekstrom of NCCI or Greg Jamison of MEMIC, would not enable me to rule on the relative merits of the two classifications with any confidence, and I would expect a more suitable record had that been the question before me.

The question before me is narrower, and easier to answer based on the evidence presented by the parties. That question is whether MEMIC acted reasonably based on the information available to it at the time, not whether the additional information submitted at the hearing might have made a difference had it been submitted to MEMIC at an earlier date. As Perry Transport phrases it, the question is whether "an insurer conducting an adequate audit of that information could have determined ... from that information" that Paving or Repaving (Code 5506) might be an appropriate classification for all or part of the operations of Perry Transport, Inc.

If the question is read literally, so that the phrase "that information" refers to Perry Transport's "records from the time period in question," the answer is clearly no. There is nothing in the dispatch logs or other business records that would call Perry Transport's classification as a trucking company into question. If "that information" is more broadly construed to encompass all the information presented by Perry Transport at hearing, then, for the reasons discussed earlier, I do find it more probable than not that information did exist at the time the policies were audited that might have led an auditor conducting a physical inspection to consider Paving as well as Trucking as a possible classification. However, as discussed more fully in the analysis of Question 3 below, to say that a reasonable auditor would have sought out and acted on such information would be an extreme case of hindsight. I also find that even with a physical audit that happened to include a visit to an asphalt project in progress, a reasonable auditor might have concluded that the application correctly described the business of Perry Transport, Inc. as trucking.

## ***2. Timeliness of the Challenge to the Audits***

Perry Transport next requests a "finding as to when the evidence showed that Petitioner first contested the erroneous classification." This begs the question –

as noted above, I do not find the classification erroneous. Subject to that qualification, I find that Perry Transport first placed MEMIC on notice that the classification was in dispute on January 25, 2002, when insurance producer Steve Dorsey wrote MEMIC to advise that Perry Transport "is disputing the audit for the most recent policy year as well as the audit from the previous year which was written through another agent. They do not agree with the trucking classification used in the audit."

Mr. Perry did, however, testify that his concerns with the classification actually began much earlier: that he learned about a competitor with a split classification in 2000, in the middle of the construction season, probably in August, and began discussing his concerns with MEMIC underwriter Greg Jamison soon thereafter. However, Mr. Jamison did not appear as a witness, there is no documentation of Perry Transport's dialogue with MEMIC, and it is even possible that Mr. Perry remembered the year inaccurately, perhaps influenced by the erroneous "February 6, 2001" date on MEMIC's letter to Mr. Perry in response to Mr. Dorsey's 2002 letter.<sup>3</sup> Although Mr. Perry may well have had strong misgivings about the classification in 2000 or early 2001, his renewal application to MEMIC on March 15, 2001 nevertheless described his trucking business in the same manner as his initial application did. I infer from the record that Perry Transport did not actually find a carrier to provide coverage with a split classification until the fall of 2001. Whatever those prior conversations between Mr. Perry and Mr. Jamison might have been, I find that Perry Transport acquiesced in the outcome.

In its post-hearing statement, Perry Transport argues that it "at a minimum first contested the classification with MEMIC when it stopped paying its premium." Perry Transport cites *Colonial Plastering*,<sup>4</sup> in which an employer contesting the cancellation of its policy for nonpayment raised the affirmative defense that it did not owe the amount it was billed. According to Perry Transport, it should be immaterial that it did not request a hearing to contest the cancellation while Colonial Plastering did. In one sense, this is correct – Perry Transport has raised essentially the same defense to MEMIC's collection action that Colonial Plastering raised to MEMIC's policy cancellation, and a fundamental premise of this hearing is that Perry Transport had the right to raise that defense. However, *Colonial Plastering* does not stand for the proposition that failure to pay a bill, in and of itself, constitutes adequate notice of dispute. In *Colonial Plastering*, the chronology indicates that the employer had requested a specific reclassification before the 1997–98 renewal policy ever took effect, and made a partial premium payment reflecting the rate requested. Here, by contrast, Perry Transport stopped making payments entirely,<sup>5</sup> and the first request for reclassification was not filed until more than two months after the renewal policy terminated. The proper point of comparison here is not Colonial Plastering's 1997–98 policy, but its 1996–97 policy, which was not placed in issue in that proceeding even though it was still in force at the time Colonial Plastering first requested reclassification.

Therefore, after reviewing both the chronology and the substance of Perry Transport's challenge to the audits, I reaffirm my finding that "the Petitioner did not raise a timely challenge to the MEMIC audit sufficient to compel that this correction be made retroactively." Perry Transport's motion requests "an analysis as to why that time period [between the audit and the time it was contested] was not 'within a reasonable time after audit.'" However, the reason I spoke in terms of both timeliness and sufficiency is that neither 24-A M.R.S.A. § 2320 nor other applicable law imposes any hard and fast procedural deadlines that would be dispositive in a situation like this.

In this case, the letter of January 25, 2002 purported to contest both the audit of the 2000-01 policy and the audit of the 2001-02 policy. With regard to the first policy, there was far too much water under the bridge and the challenge simply was not filed within a reasonable time after the audit. The audit invoice was originally issued on June 1, 2001. Perry Transport did contest that invoice, but not on the ground that the business itself was misclassified, only that the clerical and executive payroll was inadvertently included in the trucking payroll. MEMIC agreed, reduced the bill accordingly, and as far as can be determined from this record, the dispute, such as it was, was resolved when MEMIC and Perry Transport entered into a payment agreement based on the continued use of Trucking as the one basis classification for the business, the same classification which, as already noted, had been requested by Perry Transport, Inc. in its renewal application and which had historically been consistently used for both Perry Transport entities.

With regard to the second policy, however, the letter of January 25, 2002 would unquestionably have been timely, had it been responsive to issues raised by the audit invoice issued on January 8. However, that letter raised no issues specific to the audit, but merely asserted, without further elaboration, that Perry Transport disputed the audit because it did not agree with the classification – the same classification that was used on this policy and on all previous policies. In her February 6 response to Mr. Perry, Diane Evans of MEMIC referred to a series of conversations with Mr. Dorsey and Mr. Perry about possible alternative classifications, and explained why MEMIC continued to believe that Trucking (Code 7228) was the appropriate classification. There is no evidence that Mr. Perry or Mr. Dorsey pursued the dispute further with MEMIC, and no evidence that would suggest that the substance of Ms. Evans's February 6 letter is in any way inaccurate or misleading. Although Perry Transport emphasized at the hearing that her letter "makes no mention of the other part of" its business, neither did Mr. Dorsey's letter to which she was responding, and neither did the policy application. Mr. Perry has at all relevant times operated two distinct businesses – Perry Transport, Inc. and Perry Transport, LLC – but there is no evidence that the one policyholder on this policy, Perry Transport, Inc., has ever held itself out as conducting multiple distinct businesses.<sup>6</sup>

Perry Transport then attempted to initiate an appeal to NCCI on August 16, 2002. There was testimony regarding Mr. Perry's letter, but the letter itself,

which was apparently misdelivered, was not offered into evidence. I find that Mr. Perry reasonably believed he was initiating an appeal to NCCI, and thus took action to preserve whatever rights he had to contest the classification. However, the rights he had at this point, to the extent that they involved presenting additional information and argument regarding the nature of his business operations rather than pursuing the correction of outright mistakes by MEMIC's auditors or underwriters, went only to the ongoing underwriting of the account and not to reopening the terms of policies that had already terminated and been through the final audit process.

### **3. The Auditor's Duties**

Finally, Perry Transport requests a ruling as to whether "the insurer MEMIC or the insured Perry Transport had a duty to ensure that the proper classification was applied to the insured." Clearly, Perry Transport is correct that the duty rests primarily on the insurer. The issue in this case, however, is what obligations that duty entails. The insurer does not have the duty to prove a negative. It is not necessary to consider every classification in the manual and compare them all one by one. If the insurer has determined that the classification requested in the application is an accurate description of the risk, and is not aware of any alternative classification that might fit the risk even better, the insurer has fulfilled its duty. The *Scopes Manual* assists in this process by comparing each classification to other classifications that might apply, and nothing in the description of Code 7228 raises any red flags suggesting that another classification might be better suited to Perry Transport. If anything, the analogy to concrete mixers might suggest that even if the asphalt operations had been singled out for special consideration earlier, those operations could still reasonably be regarded as falling within the scope of Code 7228.

It is worth noting that it was not until August of 2002, more than six months after the final audit of the second policy was completed, that Perry Transport offered the first specific proposal of any alternative classification for which there is evidence in this record. Even then, the proposed alternative was not Code 5506 but Code 7380 (Drivers and Chauffeurs – Not Otherwise Classified) – a classification that is specifically ruled out by the defining criteria in the *Scopes Manual* and that Perry Transport has since conceded is not an appropriate classification for this risk. This history corroborates my finding that a reasonable underwriter could reasonably conclude, based on the information available at the time, that Code 7228 best describes this risk.

Perry Transport argues that it would be unfair to allow insurers to take advantage of unsuspecting employers and impose the most costly classification possible unless and until the policyholder complains. Perry Transport is absolutely correct. But it would also be both unfair and unworkable to impose an affirmative duty upon the insurer not only to act as an advocate for the policyholder, but to outperform the skilled, experienced insurance professionals

the policyholder hired for that purpose and who, as far as this record indicates, proposed Code 5506 for the first time more than a year after the second policy terminated, in December of 2002. There is no evidence that MEMIC had previously concealed, ignored, or failed to pursue information that would have been favorable to Perry Transport.

Perry Transport argues further that the audit procedures were inadequate and that every premium audit should involve "researching the entire business of the insured." In his testimony, Mr. Perry objected that the audit of the 2000-01 policy was not based on any visit to the premises, but simply consisted of an inspection of Perry Transport's business records at the offices of its payroll service. This is common practice, however, and was not in any way unreasonable in these circumstances. The primary reason insurers conduct audits are for their own protection, and they have considerable discretion how thoroughly to audit any given risk in any given year. There is no evidence that MEMIC's auditors ignored any leads that a reasonably diligent auditor would follow.

### ***Order and Notice of Appeal Rights***

It is therefore *ORDERED* that the denial of Perry Transport's Petition is *REAFFIRMED*, for the reasons set forth above and in the original Decision and Order of August 25 which is hereby incorporated by reference.

This Decision and Order on Reconsideration 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 November 4, 2003. 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**

**SEPTEMBER 25, 2003**

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**ROBERT ALAN WAKE**  
**DESIGNATED HEARING OFFICER**

<sup>1</sup> 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.

<sup>2</sup> It should be noted that the rating system, overall, is more subtle than the discrete categories of the classification system might suggest. In particular,

experience rating is a major factor in establishing an employer's premium. Perry Transport's experience modification factor of 0.84 reflects a better-than-average, but not anomalously low, loss history. In a lower-risk classification, the same loss history would result in a higher experience modification factor. In addition, Perry Transport received a 15% schedule rating credit on the first MEMIC policy and a 10% credit on the second policy; MEMIC might have given different credits had the rating calculation started from a different classification baseline.

<sup>3</sup> It is clear from the letters and the events described that the February 6 letter is a response to the January 25 letter and that both letters were actually sent in 2002, consistent with experience that it is far more common for misdated letters to be dated last year than to be dated next year. I was preparing to ask some questions to clarify this point for the record, when I saw that MEMIC was offering a version of the February 6 letter with the date corrected. I should have asked the question anyway, since the parties stipulated that MEMIC's handwritten annotations were not in evidence. However, the correct date of the letter is not reasonably in doubt, and I reached this conclusion independently on the basis of evidence already in the record.

<sup>4</sup> *Colonial Plastering v. MEMIC*, No. INS-97-23 (Me. Bur. Ins. Apr. 16, 1998).

<sup>5</sup> A substantial balance was still owing on the first year's premium, because the audit revealed that the actual payroll was significantly in excess of the original estimate. Perry Transport entered into an agreement with MEMIC to pay by installments, but stopped paying after the first installment.

<sup>6</sup> As noted in the August 25 Decision and Order, the split classification under the current Perry Transport policy is based on a different exception to the single classification rule, allowing separate classifications for construction operations – but there is no evidence that Perry Transport was claiming at the time to be engaged in construction operations. Moreover, the first documented request by Perry Transport for a specific alternative classification, the August 2002 NCCI letter, does not request a construction classification. Indeed, the record would support an inference that one reason contractors like Pike Industries use separate trucking subcontractors is to separate the trucking activities from their overall construction business.