

At first glance, "charitable or welfare organization," Codes 8861 and 9110,³ would seem to be that single governing classification. Penquis is organized as a charitable corporation, qualifies under paragraph 501(c)(3) of the Internal Revenue Code, and has the mission of administering or operating government social service programs, so the applicability of these codes might seem obvious. And it would indeed be obvious if Penquis operated in Montana or New Hampshire, the two states that have implemented a "state special" amendment to the *Scopes Manual* under which the definition of charitable or welfare organizations expressly includes "Umbrella organizations, such as Community Action Programs or United Way: These organizations sometimes operate two or more distinctly different social or welfare service programs that are often otherwise distinctly defined in the *Basic Manual* or *Scopes Manual*, such as home weatherization, head start schools, family planning clinics, and home medical care."

However, a different *Scopes Manual* description defines these classifications in every other state that has adopted the NCCI classification system, including Maine. In contrast to the state special language for Montana and New Hampshire, the nationwide description not only makes no mention of "umbrella organizations," but expressly warns that "Certain enterprises may appear to be 'charitable or welfare organizations' but are not classified as such for workers [*sic*] compensation purposes." The purpose of the classification system is to evaluate the risks faced by workers, so the focus in determining whether an employer is the kind of "charitable or welfare organization" contemplated by these classifications must be the kind of work performed by its employees, not by the finances of the employer or its charitable mission.

In the context of the classification system, "charitable or welfare" is shorthand for a particular sector of the broad spectrum of social service work, involving, in the words of the *Scopes Manual*, the provision of "sleeping accommodations, meals, counseling, education, training and employment," with four specific examples given as reference points: homes for youths or physically, mentally or emotionally handicapped clients; temporary shelters for abused persons; halfway houses; and rescue missions. Although a "charitable or welfare organization" need not operate residential programs, the clear intent of this classification is to describe entities with a similar level of "hands-on" involvement with clients, whereas the majority of Penquis's programs are office-based. The most significant program that comes anywhere close to fitting the nationwide version of these codes is Head Start, which provides education to low-income clients,⁴ but far more closely resembles a nursery school than a group home or shelter, and which, accordingly, was classified under Codes 8868 and 9101 under the "seven-code plan."⁵

NCCI did offer testimony that there is little or no substantive difference between the state special and nationwide versions of the "charitable or welfare" classifications, but that testimony was conclusory and unpersuasive, providing no meaningful insight into the decisionmaking process by which the scope of these classifications was determined, how "umbrella organizations" have historically been treated, or why the drafters of the state special language found it necessary to add the reference to umbrella organizations to the description of the scope.

It should be noted that before Codes 8868 and 9101 were adopted, "charitable and welfare organizations" were assigned a single code, Code 8837, but that code was "A-rated" – that is, it had no rate of its own, and each employer within that classification would be rated as the weighted average of the rates for the other codes most closely analogous to that particular employer's operations. As MEMIC noted, assigning Penquis an A-rated classification would be the functional equivalent of the "seven-code plan." However, it is not identical. It would be inappropriate to take a risk that was formerly assigned to Code 8837 and undo the decision of NCCI and the Superintendent that enough information was now available to assign a unified rating structure for those risks. But Penquis was never assigned to Code 8837. To whatever extent that might be evidence of the historic scope of the "charitable or welfare organization" designation, that would provide further support for the conclusion that umbrella organizations such as Penquis were not within that scope.

Is the Petition Timely?

Penquis filed its request for hearing on May 28, 2004, only a few days before its MEMIC policy expired. MEMIC contends that the petition is untimely, citing *Perry Transport, Inc. v. MEMIC*, No. INS-03-412 (Aug. 25, 2003, *clarified on reconsideration*, Sept. 25, 2003), because Penquis had acquiesced in the June 2001 reclassification and did not dispute the classification until the last of the three policies at issue had almost lapsed and any prospective relief would be inconsequential. In the alternative, MEMIC contends that "At a minimum, there is 'too much water under the bridge' with respect to the first two policy years and so relief should be limited to the third policy year."

As MEMIC has observed, the issues are different with respect to the final policy year. Penquis not only unambiguously challenged its 2003–04 premium before the policy expired, but filed its request for hearing while the policy was still in force. Although the Petition was filed so late that as a practical matter all the relief requested was retroactive, Rule 1(F)(2) of the *Basic Manual* expressly provides that "Corrections in classification that result in a *decrease in premium*, whether determined during the policy period or at audit, must be applied retroactively to the inception of the policy." (*Emphasis in original*) The holding in *Perry Transport* was that in order to be entitled to retroactive relief under Rule(1)(F)(2), a policyholder seeking reclassification must make the request either during the policy period or, at the latest, within a reasonable time after the classification is confirmed on audit. Thus, the Petition is clearly timely as to the 2003–04 policy.

Likewise, it is equally clear that the Petition is untimely as to the first two policies, unless Penquis can demonstrate that waiting until 2004 was within a reasonable time after the audit on those policies closed and the parties are deemed to have agreed on the appropriate premium. Penquis offers two arguments for excusing the delay. One is that it should not be obligated to challenge MEMIC's premium while it still has an ongoing relationship with MEMIC. However, finding a new insurer does not revive a policyholder's legal entitlement to unload an attic full of past grievances against the old insurer.

The other argument raises more significant issues. Penquis contends that it reasonably believed the reclassification was appropriate at the time, but then discovered that MEMIC had not applied the reclassification consistently to other similarly situated risks. Penquis contends further that "MEMIC had engaged in the unfair and uncompetitive treatment of Penquis in a captive market; and MEMIC had deceived Penquis by insisting that seven code classification was not available, when MEMIC itself provided seven code classification to some of its other CAP insureds." If MEMIC had acted deceptively or exploited its position as carrier of last resort, Penquis would certainly be entitled to redress, but Penquis has offered no evidence that would support its claims of misconduct.

To the contrary, Penquis concedes that it "continued to complain to MEMIC about the high costs of coverage. In response, MEMIC provided discounts." Although these discounts only partially ameliorated the adverse impact of the reclassification, these were discretionary discounts that MEMIC would not have provided if it were simply out to maximize its premium at Penquis's expense. Although the reclassification was determined to be erroneous, it was not willful, oppressive, or unfairly discriminatory, and Penquis concedes further that until this year, other carriers had used the same "charitable or welfare organization" codes when providing premium quotations to Penquis.

As evidence of MEMIC's alleged deceptive intent, Penquis observes that MEMIC did continue to use multiple governing classifications for other CAPs with similar risk profiles. MEMIC acknowledges that it did, but has testified that this was the result of confusion and disorganization, not an intent to deceive. I find MEMIC's testimony credible, and find no evidence of discriminatory motive or intent in these inconsistencies. If MEMIC had uniformly treated other CAPs differently from Penquis between 2001 and 2003, retroactive relief might be in order even if such disparate treatment were accidental. But the evidence does not show that Penquis was singled out even by accident. Like the other insurers Penquis approached for premium quotes, MEMIC believed in good faith, albeit erroneously, that CAPs were "charitable or welfare organizations" within the meaning of the uniform classification system, and accordingly, reassigned most of its CAPs to the new class codes. The fact that the others had not yet been reassigned at the time of this hearing does not constitute an act of unfair discrimination that would excuse Penquis from contesting the reclassification in a timely manner.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that the Petition of Penquis C.A.P. is hereby *GRANTED IN PART AND DENIED IN PART*. MEMIC shall recalculate the premium for the 2003-04 Penquis C.A.P. policy, in a manner consistent with this Decision and Order and shall also take appropriate measures to ensure that other CAPs and other nonprofit employers with similar risk characteristics are treated in a manner consistent with this Decision and Order.

This Decision and Order 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 16, 2004. 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 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.

² Pursuant to 24-A M.R.S.A. § 2382-B, workers' compensation insurers must adhere to a uniform classification system approved by the Superintendent and administered by the designated workers' compensation advisory organization. Pursuant to 5 M.R.S.A. § 9058, the Superintendent has taken official notice of both the NCCI Basic Manual, filed by NCCI pursuant to 24 A M.R.S.A. § 2382-B(3), and the NCCI Scopes Manual (formally entitled Scopes of Basic Manual Classifications), containing more detailed descriptions of the various classification codes. These manuals, to the extent that their provisions have been approved by the Superintendent, have the same legal effect as rules adopted by the Superintendent. *Imagineering, Inc. v. Superintendent of Insurance*, 593 A.2d 1050, 1052 (Me. 1991).

³ These two codes are expressly designed to be used in tandem, with Code 8861 applying to the professional and clerical employees and Code 9110 to all other employees, including drivers.

⁴ Penquis argues that an additional ground for finding the "charitable or welfare" codes inapplicable is that its clients are not "needy." I find, however, that the term "needy" was not meant to single out the extremely poor as a caste, and that Community Action Programs do serve needy clients within the meaning of the classification descriptions.

⁵ Despite the title "Colleges" that was given to these classifications, they apply to the full range of educational institutions, including kindergartens and nursery schools.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

OCTOBER 7, 2004

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER