



Pennsylvania Compensation Rating Bureau

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PENNSYLVANIA TEST AUDIT PROGRAM **BULLETIN # 95**

TEST AUDIT APPEAL DECISION

Per Bureau Circular No. 1479, the result of an insurance carrier appeal to the Audit Committee is presented to the membership for their information.

The insured is a landscape contractor engaged in the consulting, design and installation of landscaping projects for members of the general public. The appeal centered on the allocation of payroll of one employee, the president of the insured. The carrier had assigned the president's payroll to Code 012, Landscape Contractor, while the test audit had assigned the payroll of this employee to Code 951, Salesperson – Outside.

The carrier described the insured's operations as providing landscaping and design services for unrelated clients with all actual landscaping work being subcontracted to unrelated concerns. It was noted that all of the employees on the insured's payroll were engaged in administrative functions and did not travel to job sites. However, the president did travel to job sites to instruct the subcontractors on what was expected for a particular job. The carrier indicated that for landscape installation work the insured hires subcontractors who may have employees or who may work alone without employees. The carrier stated that, since some of the subcontractors were individuals with no employees, the president necessarily exercised direct supervision of the activities of these individuals at the job sites. Therefore, given this "direct" supervision the president's job duties did not meet the restrictive definition of an executive supervisor (assignable to Code 951), so his payroll was required to be assigned to Code 012.

The carrier further noted that 50 percent of the president's time was spent directly supervising the individual contractors. Lastly, the carrier argued that it had always interpreted the executive supervisor classification procedure as applying only to large construction contractors. Since the insured is a small firm performing landscaping, the executive supervisor rule should not be applied in this instance. The Committee was provided with a document signed by the president listing his job duties, which confirmed the documentation on the carrier's audit worksheets. (It was noted that, although signed statements from insureds pertaining to corporate officers' duties could be considered, they would not be determinative as to the duties or classification of those officers.)

Bureau staff agreed with the carrier's description of the insured's overall operation. Staff further explained that the assignment of the president to Code 951 by the Bureau was based on the executive supervisor procedure. The duties of the president in this case included soliciting business, planning and hiring subcontractors and indirect supervision. In addition, it was noted

the president did not work exclusively at any given job site but visited several different job sites on any given day. As a result, staff contended that the president qualified as an executive supervisor as defined in the Pennsylvania Workers Compensation Manual Rulings and Interpretations Section. The third paragraph of that entry reads as follows:

An exception to the above-stated application would apply to a job superintendent responsible for and physically located at a specific job site where all operations are subcontracted to unrelated concerns. In this instance, the contractor has no construction workers at the job site, and the superintendent cannot exercise direct control of the subcontractor's employees. Therefore, in this circumstance the job superintendent should have his/her payroll assigned to Code 951.

This exception stipulated that, if a contractor has no construction/contracting employees and subcontracts all labor to unrelated concerns, Code 951 is extended to the superintendent of the job site. Bureau staff stated that, since this employer had no labor staff and subcontracted all work to unrelated concerns, the executive supervisor procedure must be used when determining classification and payroll assignments. It was explained by staff that the procedure was applicable to the insured in this case because the insured had no labor force at the job site and used subcontractors only. The fact that the insured hired some subcontractors who were individuals with no employees did not in and of itself create a direct employment relationship between the insured and those subcontractors.

The Committee questioned both the carrier and staff regarding the individual subcontractors and how they were treated on the audits. It was established that the insured hired some subcontractors that had employees and other subcontractors that did not have employees. Staff commented that the insured could not directly supervise subcontractors who were not employees. Finally, clarification was provided that, although the carrier considered the president to have direction and control over the individual subcontractors, no premium charge was made by the carrier for those subcontractors that did not produce a valid certificate of insurance.

The Committee then went into executive session. The Committee recognized that the executive supervisor procedure in Pennsylvania essentially requires that there be no direct supervision of employees in order for Code 951 to apply. Only indirect supervision is permitted. Since the insured had no employees on site and the carrier admitted to determining no employment relationship with any independent contractor on site (no payroll was picked up for any uninsured subcontractor), the Committee believed that the carrier had not supported their position sufficiently to warrant a reversal of the Bureau decision to assign Code 951 to the employee in question.

Accordingly, upon motion made and duly seconded, it was voted unanimously to sustain the Bureau decision of assigning Code 951 to payroll developed by the president of the insured.