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**Appeal of Composite Company, Inc., of a Classification
Assignment by the Workers' Compensation Rating
and Inspection Bureau of Massachusetts
Docket No. W2019-01**

Decision and Order

On May 28, 2019, the Composite Company, Inc. (“Composite”) appealed to the Commissioner of Insurance a decision by the Workers’ Compensation Rating and Inspection Bureau of Massachusetts (“WCRIB”) Appeals Committee assigning it to Class Code 5040, Iron and Steel Erection –Frame Structures, for the purpose of calculating the workers’ compensation insurance premium for Composite employees providing shear connector welding in connection with a project whose principal insured was an enterprise engaged in erecting a multi-story iron or steel-framed building. Composite, whose principal business is welding shear connectors, objects, asserting that its employees who perform that operation were historically assigned to Class Code 3365, Welding or Cutting, NOC and Drivers.

The appeal was docketed and an initial letter (the “June 5, 2019 letter”) issued, ordering Composite to submit for the record copies of materials documenting the history of Composite’s classifications and the proceedings at the WCRIB. The WCRIB was ordered to respond to Composite’s submissions; a prehearing conference, scheduled for September 13, 2019, was later continued to October 17, 2019. Both parties submitted documents in response to the June 5, 2019 letter. On October 7, Composite provided additional documents to supplement its initial response. At the conference, the parties agreed to submit additional materials responsive to questions raised at that conference. Composite provided an affidavit from Gary Hawkins, its vice-president of operations, with exhibits. The WCRIB responded on December 5, 2019, and Composite provided a final summation of its arguments on December 11. Both parties agreed that the documentary record was complete, and that there was no need for any additional discovery or an evidentiary hearing. Neither raised any objections to the documents submitted.

The dispute arises from the WCRIB’s position that welding activities by a business enterprise that are performed at the site of an enterprise assigned to Code 5040 must also be assigned to that Code, and Composite’s argument that the shear connector welding that it performs, and performed on the project that gave rise to this dispute, occurs after the erection phase of the steel frame building is completed and in conditions that differ from those associated

with erecting a steel framed building. For those reasons, Composite asserts, it should be assigned to Code 3365.

Historical Background

For purposes of this proceeding, Composite is described as an established business that is principally engaged in high volume stud shear connector welding on building projects.¹ As a Massachusetts employer, it purchases mandatory workers' compensation insurance. Premiums for that insurance vary depending on the nature of the business enterprise and the risks associated with it, quantified by analyzing claims from businesses assigned to a particular classification code. Employers generally work with insurance producers to obtain workers' compensation coverage; if no insurer elects to accept the employer's application, the employer may apply to the Assigned Risk Pool managed by the WCRIB. The WCRIB reviews the application and, if it is accepted, assigns the business to a member company.

At times, Composite has been insured on the voluntary market; when that coverage is unavailable, it has obtained insurance through the Assigned Risk Pool. The record in this matter includes historical information documenting interactions between Composite and the WCRIB over approximately 23 years. Composite and the WCRIB each submitted copies of the statement Composite presented to the Appeals Committee. Composite also included copies of the documents that were submitted as exhibits to that statement.² On October 7, 2019, in anticipation of the October 17 prehearing conference, Composite provided additional information.³ In a post-conference submission, dated November 21, 2019, Composite provided

¹ The basic classification code for welding firms is 3365 (Welding or Cutting-NOC & Drivers). As shown on its applications for workers' compensation insurance, Composite, like many companies, has been engaged at various times in work that is assigned to different class codes, such as Code 5538 (Sheet Metal Working), 5701 (Wrecking-buildings or structures) and 6251 (Tunneling). The portion of estimated payroll that is assigned to each class code is reported on the application. Composite's applications also show assignment of a portion of its payroll to Code 5040, perhaps referring to work on steel bridge erection. The assignment of payroll for such work to Code 5040 is not at issue in this matter, nor is the payroll assigned to the standard exception classes, Code 8742 (Salespersons) and Code 8810 (Clerical Office Employees).

² Those documents, in addition to the January 17, 2019 ruling and Composite's notices of appeal, included: 1) the National Council on Compensation Insurance ("NCCI") Scopes Manual description of Code 5040; 2) a 13-page excerpt from the website www.steelconstruction.info/construction; 3) additional sections of steel construction information; 4) the Iron Workers District Council Training Manual, Subpart R, Connection Training and Fall Hazard training for connecting activities; 5) a manufacturer's manual from Nelson Weld-thru-Deck about the installation of shear studs; 6) additional section of the Iron Workers District Council Training Manual, on Controlled Decking Zones; and 7) a photograph of rebar installed over decking.

³ Attached to that letter were the following: 1) Document dated July 2, 2001 calculating Composite's experience rating; 2) Series of documents relating to Composite's 2001 application for insurance through the Assigned Risk Pool and WCRIB review of that application; 3) Scopes Manual Phraseology for Code 5040, Iron or Steel Erection, Frame Structures dated December 1, 2002; 4) Information Page for Composite's 2003-04 workers' compensation policy issued by American Home Insurance Company; 5) Composite's 2014 application for insurance through the Assigned Risk Pool and related correspondence with the WCRIB; and 6) Composite's August, 2018 request to the WCRIB to produce documents relating to the revised scopes of classification codes 5040, 5059 and 5538 and the WCRIB response stating that the only documents relevant to Composite's appeal of its assignment to Code 5040 were the Appeals Committee decision, Circular letter CL2331 and the Massachusetts Workers' Compensation and Employers Liability Insurance Manual.

additional exhibits as part of its response to questions raised at that conference.⁴ The WCRIB submitted documents that, in addition to records relating to the proceedings before its Appeals Committee, provided additional background material relating to the changes documented in Circular Letter 2331 (“CL2331”), the impetus for this dispute.⁵

The parties’ submissions are the source for a brief reconstruction of the history of Composite’s classification assignments. In 1997, the WCRIB issued a ruling approving the assignment of Composite’s stud shear connector payroll to Code 3365, Welding.⁶ In 2001, Composite applied to the Assigned Risk Pool; the application assigned its payroll to Code 3365, with an added assignment to Code 5040 on an “if any” basis. The WCRIB asked for additional detailed information on Composite’s operations, noting that, as discussed below, a previous application had included additional Code assignments and, in particular, requesting data on the “approved Code 3365.” Ultimately, the WCRIB accepted the application with the payroll assigned to Code 3365.⁷

In July 2014, Composite again applied for insurance through the Assigned Risk Pool, allocating its operations payroll to five classification Codes. Over half its payroll (\$442,000) was assigned to Code 3365; of the remainder, \$200,000 was assigned to Code 5059 (Iron or Steel Erection-Frame structure not over two stories in height); \$132,000 to Code 5538; \$40,000 to Code 5701 and \$20,000 to Code 5040. The WCRIB questioned the assigned codes, citing to Code 5040 as the appropriate code for welding structural steel; it also asked for a description of the duties of employees assigned to Code 5538. Attached to its inquiry was a premium calculation sheet that reassigned the payroll assigned on the application to Code 3365 to Code 5040, and reassigned the Code 5538 payroll to Code 3365. After receiving further clarification

⁴ Those exhibits were: 1) Page 171 from the Means Illustrated Construction Dictionary defining terms related to the erection of buildings; 2) Composite’s 2014 application for workers’ compensation insurance through the Assigned Risk Pool and related communications with the WCRIB relating to that application; and 3) Table of Contents and two pages defining the term “structural steel” from the *Code of Standard Practice for Steel Buildings and Bridges*, American Institute of Steel Construction, June, 2016.

⁵ Its exhibits included: 1) selections from the Scopes Manual addressing Codes 5040, 5059, and 5538; 2) a page from a WCRIB filing through the SERFF system on or about May 30, 2018, and accompanying pages documenting changes to the classification section of the WCRIB Manual; 3) Scopes Manual entry for Code 5040 posted 29 September, 2017; 4) Draft, dated June 5, 2017, of proposed Massachusetts addenda to Codes 5040 and 5059; 5) documents presenting the WCRIB’s proposal for addenda to Codes 5040, 5059, and 5538; 6) Rule IV, Classifications, from the WCRIB Manual; 7) Documents relating to Composite’s 2014 application to the Assigned Risk Pool; 8) 2017 WCRIB Insurance Rate Filing, Section IX, Classification Pricing, pp. 17-19, and draft rate tables; 9) *Decision and Order on WCRIB 2017 Rate Filing*, Division of Insurance Docket No. R2017-01; 10) Stipulation on WCRIB Rates, Classification and Rating Plans for 2018; and 11) WCRIB Notice of May 19, 2019 Appeals Committee meeting.

⁶ Because the WCRIB was not able to locate a copy of that ruling, the context in which it was issued cannot be determined. However, in connection with Composite’s 2001 application for insurance through the Assigned Risk Pool, the WCRIBMA stated that the referenced ruling approving the assignment to Code 3365 was issued, to be effective August 21, 1997.

⁷ The application was assigned to the Travelers Indemnity Company of Illinois. A copy of an information page issued to Composite by the American Home Assurance Company on August 14, 2003, shows that at that time the entire operations payroll was assigned to Code 3365. No audit reports or other documentation challenging assignments of Composite’s payroll to that code are included in the records of this proceeding. On a 2014 application to the Assigned Risk Pool, Composite indicated that between August 2, 2011 and August 2, 2014 it was insured by the Continental Indemnity Company.

from Composite's insurance producer, the WCRIB reinstated the classification codes on the initial application and assigned Composite to Liberty Mutual Fire Insurance Company.

The Genesis of this Dispute

On March 29, 2018 the WCRIB issued CL2331, transmitting to WCRIB members revisions to the scope of Codes 5040, 5059 and 5538, to be effective as of July 1, 2018.⁸ On May 1, 2018, after receiving a copy of CL2331 from his insurance producer, Mr. Hawkins wrote to the WCRIB, setting out Composite's position that its work, welding shear connectors through a deck to structural beams on finished floors, should not be assigned to Code 5040. The WCRIB responded by letter dated May 25, 2018, asserting that the scope of Codes 5040 and 5059 had been revised "in the early 2000s" to indicate that "welding operations are considered incidental to the main iron or steel erection work and should be classified on the same basis." It contended that CL 2331 did not change its rationale for assigning Composite to Code 5040 but simply clarified that decision.⁹ Composite, in response to that letter, offered additional detail about its operations and requested a meeting; the WCRIB's reply indicated that no change would be forthcoming. A letter from the WCRIB to Liberty Mutual dated October 26, 2018, identified as a "policy criticism notification," instructed the insurer to reallocate Composite's payroll allocated to Code 3365 to 5040 and to submit the revised policy to the WCRIB.

On November 30, 2018, Composite again contacted the WCRIB, suggesting that it inspect a job site at 295 Northern Avenue, South Boston, where Composite was welding shear connectors. The letter asserted that the inspection would show both the welding operation itself and the context in which it was performed, a work site with cables around its perimeter and decking above it. A WCRIB staff member performed an inspection and, on January 17, 2019, issued a report that assigned Composite to Code 5040 for two types of work: Installation of Head Stud Shear Connectors in Connection with Iron or Steel-framed Buildings and Iron or Steel Bridge Construction, including the Installation of Head Stud Shear Connectors. Accompanying the report were three photographs relating to the first type of work.¹⁰

Composite responded on January 24, 2019, asserting that the federal Occupational Safety and Health Administration ("OSHA") has issued a standard that separates stud welding from steel erection and reiterating its position that it qualifies for a Code assignment consistent with those assigned to other building trades that work on finished floors of steel framed buildings. On March 11, 2019, Composite, through counsel, appealed the WCRIB's January 17, 2019 assignment.¹¹ The WCRIB acknowledged receipt of that appeal on March 20, and scheduled a hearing before its Appeals Committee for May 9, 2019. The Appeals Committee decision cites

⁸ Both Composite and the WCRIB submitted copies of the Circular Letter in response to the June 5 Letter.

⁹ In its May 25, 2018 response to Composite, the WCRIB contends welding shear connectors have long been considered incidental to steel erection work and that it was error for the WCRIB to have allowed Code 3365 to have remained on Composite's 2014 application for workers' compensation coverage. It alleges that Composite benefitted from an alleged "lack of clarity" in the scope of codes 5040 and 5059, noting at the same time that Composite had a right to rely on the classifications assigned by the WCRIB.

¹⁰ Composite and the WCRIB each submitted copies of those photographs, which were taken in color. One set of submitted photographs was printed in black and white. Because the color reproductions provide significantly clearer views, those are the exhibits I have considered in this review.

¹¹ The initial appeal was amended later the same day to add specific references to OSHA regulations.

to the Scopes note for Code 5040, that welding operations are considered “incidental to the main iron or steel erection work and should be classified on the same basis as that work.” It also describes the process of installing shear connectors, noting that the work takes place after sheet decking is laid and before the installation of concrete rebar and mesh, activities that are performed by separate concerns.”

Discussion and Analysis

The NCCI Scopes Manual publishes brief descriptions of classification codes (“phraseologies”) that all states generally use as the basis for their own code classifications. The NCCI phraseology for Code 5040 is “Iron or Steel-Erection-Frame Structures.”¹² The WCRIB’s decision arises, in part, from an expansion of that text to affect the classification of a business enterprise that is not directly assigned to Code 5040 but is, in this case, performing welding in connection with a project that was assigned to Code 5040. In pertinent part, the 2017 Scopes note states that it applies to:

Insureds engaged in the erection of iron or steel frame structures, including assembling or fabricating at the job site. It contemplates the raising of the structural members into place using a crane or boom and securing by bolting, welding or riveting the frame or skeleton of buildings...”

It also applies to specialist contractors erecting concrete structural beams or girders or engaged in connecting bar joists to the steel framework.¹³ The Scopes manual further notes that “[w]elding operations, whether performed by principal or specialist contractors, are considered incidental to the main iron or steel erection work and should be classified on the same basis as such work.”

The Scopes Manual description of Code 5040 identifies welding as a process that may be associated with the erection of iron or steel-framed buildings, listing it as one of several specified techniques that are used to secure the building’s structural members to create the frame or skeleton. No party questions that, by its terms, Code 5040 applies to workers welding iron or steel structural members to create the frame of a building. The focus of this dispute is whether Composite’s shear connector welding on this building site should be considered part of the erection process.

Composite argues that the shear connector welding it performed at 295 Northern Avenue was not associated with erection of the building frame but occurred after the structural members were joined and metal decking was installed to create floors. The WCRIB rejected Composite’s argument, basing its decision on the statement in CL2331 that, as a result of changes to the rates for Codes 5040, 5059 and 5538, “Code 3365-Welding, etc., Code 9534-Mobile Crane, etc., and Code 5538-Sheet Metal Work, etc. cannot be assigned at the same job or location to which Code

¹² Code 5059 uses the same phraseology, but relates to the erection of iron or steel framed structures that are no more than two stories high. The WCRIB reclassification decision related to work performed by Composite at a structure that was more than two stories high.

¹³ A Massachusetts note in the 2017 Scopes Manual refers to erection of concrete pre-cast structural beams or girders as falling within Code 5040, along with the installation of outside fire escapes and fireproof shutters. That language is retained in the 2018 Scopes Manual; on June 29, 2018 that Manual was amended to incorporate the contents of CL2331 in the Massachusetts addendum.

5040 or 5059 applies.” Upon review of the record, I am not persuaded that, absent evidence that the welding is performed during the erection phase of raising a steel-framed multistory building, the WCRIB’s blanket inclusion in Code 5040 of welding work performed after the steel-frame structure is erected is reasonable.

Because the Scopes Manual applies Code 5040 to insureds engaged in the “erection of iron or steel frame structures,” the parties were asked, at the prehearing conference, to comment on the word “erection” as a defined phase in the context of iron or steel framed building construction. In response, Composite provided definitions of that term from the *Means Illustrated Construction Dictionary* and a website, www/steelconstruction/info. The former defines erection as “[the] [positioning and/or installation of structural components or preassembled structural members of a building, often with the assistance of powered equipment or a crane]”; the latter summarizes it as follows: “[t]he erection of structural steelwork consists of the assembly of steel components into a frame on site. The processes involve lifting and placing components into position, then connecting them together. Generally, this is achieved through bolting, but sometimes site welding is used.” Composite also submitted an excerpt from the Code of Standard Practice for Steel Buildings and Bridges, issued by the American Institute of Steel Construction in 2016 that defines structural steel. The WCRIB neither challenged those definitions nor submitted any alternatives.

The WCRIB distinguishes erection from construction. See WC Manual, Rule IV. D.8, Construction or Erection Operations (emphasis added.) The Massachusetts State addendum to Code 5040 refers to workers who do preparation work for structural steel members, perform all tasks, including welding, relating to connecting those members, install bracing members to add stability during the erection process and install metal decking on each floor level, as the “steel erection crew.” The addendum also includes installation of edge protection, using structural steel rail systems, to prevent falls from heights, as a part of the erection process that is within Code 5040. Manual Rule IV decrees that a separate construction or erection classification “shall not be assigned to any operation that is within the scope of another classification assigned to such a job or location.” In conformity with industry practice as described in the documents provided by Composite, Code 5040 unquestionably includes workers performing welding to connect the structural members of an iron or steel framed building; for that reason, employees assigned to a steel erection crew who are welding such connections, whether directly employed by the enterprise erecting the building or by a subcontractor providing that service, are appropriately assigned to Code 5040.¹⁴ At issue in this proceeding is whether, once the steel erection crew has created that steel frame, welding performed during the subsequent construction phase of the project must be assigned to that code.

The Appeals Committee decision did not address the question of whether Composite’s welding of the shear connection studs at 295 Northern Avenue was consistent with activities that are primary or incidental to the erection of a steel framed building, nor analyze it in the context of the sequence of tasks undertaken as part of the internal construction of a building after the frame is erected. Welding is one of several techniques that may be used to connect structural

¹⁴ The possibility that Composite might perform steel erection work, and that payroll for employees performing that work should be assigned to Code 5040, has been acknowledged, on an “if any” basis, in Composite’s applications for workers’ compensation insurance.

steel that forms the framework of a building and the Scopes text indicates that, if it is incidental to the erection of the steel framing, workers should be assigned to Code 5040.¹⁵ The Appeals Committee did not address the circumstances in which welding is “incidental” to the steel erection stage.

Second, the WCRIB argues that CL2331 was developed in response to concerns that, during the bidding stage of a project, employers assigned to Code 5040 who are erecting iron or steel framed buildings were allocating some payroll to lower rated classifications, thereby reducing the cost of their workers’ compensation insurance and gaining an advantage in the bidding process. In its May 25, 2018 letter to Composite, the WCRIB stated that it had been working with industry groups to “ensure a level playing field when determining workers’ compensation costs related to a steel erection project bid proposal,” and that the revised scopes of codes 5040 and 5059 were intended to serve the “stated goal of limiting the ability of any competing bidders from gaining an advantage by misallocating payroll to a lower rated secondary classification.” CL2331 appears to be a reasonable response to perceived problems with employers assigned to Code 5040 that allocate to a lower rated code some employees who are performing a particular construction technique, such as welding, to join a project’s structural steel frame. Composite does not dispute that workers on a steel erection project who are performing the tasks described in the Scopes note, “raising of the structural members into place using a crane or boom and securing by bolting, welding or riveting the frame or skeleton of buildings...” should be assigned to Code 5040; it argues that the problem WCRIB intends to resolve is directed at employers and workers engaged in a steel erection project, and that it has improperly expanded the scope of CL2331 to encompass welding that occurs at later stages of the construction.¹⁶

The WCRIB does not suggest that the enterprise responsible for erecting the building at 295 Northern Avenue was evading its obligations to provide workers’ compensation insurance for personnel engaged in steel erection. It does not dispute that Composite’s bid on in connection with that project reflected the classification assigned by the WCRIB in 2014. The Appeals Committee arbitrarily concluded that an employer performing welding operations on a steel-framed building, even after the frame is erected, must also be assigned to Code 5040. It offered no rationale for its broad conclusion that, “all operations that are common to the erection of a steel building are now clearly assigned to the steel classifications.” It did not explore the language in the Scopes note explaining what is contemplated by the phraseology Iron or Steel-Erection-Frame Structures. Its decision sets no guidelines for determining when welding operations are related to the erection of the building and when they occur in the course of subsequent operations on its interior. Nor did the Committee consider the question of differences in the risk factors associated with erection of a steel structural frame and those encountered in operations conducted after the frame is in place and floors are installed. I am not persuaded that the WCRIB’s expansive assumption that assigning welding operations at any

¹⁵ No party addressed the definition of the word “incidental” as it pertains to the use of welding in connection with the erection of a steel framed building.

¹⁶ Composite’s concern is that, in connection with the construction of the 295 Northern Avenue building, it bid on a contract for shear connector welding that was priced on the historical assignment of that operation to Code 3365. The work under the contract apparently began some time in 2018. The retroactive application of the WCRIB’s decision meant that the bid was underpriced.

stage in a construction project to Code 5040 is essential to ensuring the fairness of the bidding process.

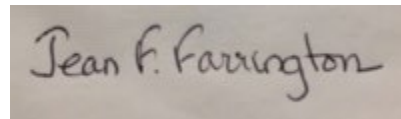
Third, the WCRIB points out that the parties reviewing its 2017 Rate Filing entered into a stipulation that the Commissioner approved, and that the approval encompassed the changes to the classification codes that are addressed in CL2331. Composite argues that, because the 2017 filing made no references to Code 3365, it offers no basis for a blanket disapproval of its assignment if the welding is performed at a job or location to which Code 5040 applies. The 2017 Rate Filing, Section IX-A, at pp.17-19, states that it has updated the scope of Codes 5040, 5059 and 5538 to “clearly describe all operations that are common to all insureds involved in these types of projects.” It explains that the changes are intended to “ensure a level playing field when determining workers’ compensation costs related to a steel erection project bid proposal and limit the ability of any competing bidders from gaining an advantage by misallocating payroll to the lower rated secondary classification.” The 2017 filing does not update the scope of Code 5040 to incorporate Code 3365.

On or about May 14, 2018, the WCRIB submitted a filing through the SERFF system to the Division, describing it as changes to the WC Manual classification section that had to be revised following approval of the 2017 filing. The revised pages accompanying the filing add a note to the descriptions of Codes 5040 and 5059 stating that Codes 5538, 9534 (Mobile Crane) and 3365 shall not be assigned at the same job or location to which Code 5040 applies. No reason for enlarging the prohibition in the manual to include Code 3365 is documented, nor is there a procedural record of formal approval as a classification change.

Conclusion

Pursuant to G.L. c. 152, §52D the Commissioner’s options, after hearing an appeal of a decision from the WCRIB, are to affirm or reverse that decision. On this record, I find that, for the reasons stated above, the Appeals Committee decision must be reversed. The matter is remanded to the WCRIB for consideration in light of the principles articulated in this decision.

Dated: 9 February 2022

A rectangular box containing a handwritten signature in black ink that reads "Jean F. Farrington".

Jean F. Farrington
Presiding Officer

Sent by email to: tw@healdlaw.net; vmccarthy@wcribma.org; doidocket.mailbox@mass.gov;