

DISPUTE REVIEW BOARD RECOMMENDATION

July 26, 2002

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Mr. Andy Swart
President
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Ref: SR 589, Suncoast Parkway - Section 5
Financial Project ID: 2589051 52 01
State Project No.: 97080-3301
WPI No.: 7152003
Majority recommendation concerning the Owner Controlled Insurance Program (OCIP)
Workman Compensation Classification Codes (Codes) used on this project. See attached
Minority Opinion.

Dear Sirs:

The Florida Department of Transportation (Department), Prince Contracting Co., Inc. (Prince), and their landscaping subcontractor, Swart's Landscaping, Inc. (Swart's), requested a hearing concerning the proper Codes to be applied to the above project.

The Disputes Review Board (Board) heard oral presentations for the Prince and Swart's from Mr. Walker, Mr. Swart and their attorney Mr. Beshears. The Department's side made oral presentations by Mr. Adderley, Mr. Jeffcott (Zurich North American Insurance representative), and Mr. Petrizzo (Aon Risk Services, Inc. of Florida's representative). Subsequent to the hearing the Board requested additional information from the Department and Prince which was all received by July 18, 2002.

ISSUE:

Did the Department and their insurance company Zurich North American Insurance Co. (Zurich), use the correct Classification Codes to apply to the labor on this project when making an audit of Prince's and Swart's payroll records to determine the Workman Compensation Costs? Are Prince and Swart's entitled to a return of all, or a portion of, the additional premiums paid for Workman Compensation Costs?

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Contractor's Position

As a result of two workers' compensation audits, the Department retroactively changed Prince's workers' compensation classification codes and assessed Prince/Swart's increased OCIP premiums. This was Prince's only project on the Suncoast Parkway. It was not clear whether or not Swart's, who worked as a subcontractor, had previous audits on Suncoast Parkway projects prior to the audit done concurrently with the first of Prince's audits. Prince/Swart's contend that being assessed increased OCIP premiums was in violation of the Department's contractual obligations, the information the Department furnished to Prince/Swart's and the other bidders, and provisions of the Basic Manual for Workers' Compensation and Employers Liability Insurance (Basic Manual) issued by the National Council on Compensation Insurance, Inc. (NCCI). Prince and Swart's contend the Department's liability for the Claim is based upon the Department's breach of its contract and the implied covenant under Florida law not to furnish misleading information to bidders. Prince and Swart's further contend that the Department violated the governing provisions of the NCCI Basic Manual.

Prince's claim, Project Summary and OCIP Requirements Follow:

The Department awarded Prince, as the lowest responsible bidder, the general contract for the Project (the Contract). The Contract required Prince and certain subcontractors, which included Swart's, to participate in an Owner Controlled Insurance Program (OCIP). See Contract, Art. 7-13. Under the OCIP, the Department agreed to furnish certain types of insurance for Prince and its covered subcontractors, including workers' compensation insurance, and Prince and the covered subcontractors were required to participate in and pay premiums for the OCIP insurance furnished by the Department. See Contract, Art. 7-13.3, 7-13.3.1 (1) and 7-13.3.2.

Though the bid documents and pre-construction meetings the Department notified Prince and its subcontractors, including Swart's, that the premium for the OCIP workers' compensation insurance would be 150% of the adjusted workers' compensation standard premium. The Department made clear that the term "adjusted workers' compensation standard premium," as used in the Contract, denoted the standard premium applicable to the particular contractor or subcontractor. Consequently, Prince/Swart's was led to believe that the classification codes normally applied to their work by their own worker's compensation carrier would be used to determine Prince/Swart's OCIP premium. The Department bolstered this belief by instructing Prince and its subcontractors, including Swart's, to submit to the Department their standard workers' compensation codes and rates for their portion of the work. The Contract provided that the applicable premium for the OCIP insurance would be (150%) of the Adjusted Workers' Compensation Standard Premium... ."

These facts are evidenced in several documents. The Contract itself, at Art. 7-13.1.2, defines "the term adjusted Workers' Compensation Standard Premium" as "the Workers' Compensation

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Standard Premium for the Contractor and its Covered Subcontractors which would result, based on the jobsite payroll, with standard limits of liability ... after application of the experience modifications for the Contractor and its Covered Subcontractors" The Contract OCIP Premium is defined at Art. 7-13.1.3 as "an amount equal to one hundred and fifty percent (150%) of the Adjusted Workers' Compensation Standard Premium"

At a pre-construction meeting conducted by the Department and attended by Prince and Swart's, the Department described the OCIP program and answered questions. The Department clarified that the Adjusted Workers' Compensation Standard Premium was derived for each contractor and subcontractor individually. For example, the prime contractor's experience modification would not be applied to each individual subcontractor, but instead each subcontractor would use its own experience modification to determine the premium applicable to that individual subcontractor.

The Department also published and circulated an OCIP Manual, which contained additional information concerning the program and outlined the claims procedures. In order to allow the Department to make proper adjustments to estimated OCIP premium payments, the manual required the contractor and each covered subcontractor to submit original certified payrolls of wages paid to each Project employee on a monthly basis, containing the name and social security number of each employee and the correct workers' compensation classification. This provision, read together with the other applicable provisions of the Contract and the bid information furnished to Prince, was interpreted to require submission of Prince's standard workers' compensation classification codes so that the Adjusted Workers' Compensation Standard Premium, as that term is used in the Contract, could be computed.

The Department also prepared a Request for Insurance forms for submission by the contractor and each subcontractor. The supplemental request for insurance form prepared by the Department required Prince and each of its subcontractors to provide information concerning the subcontractor's current workers' compensation experience modification, and also the workers' compensation classification codes and rates applicable to the specific type of work to be performed by the contractor or its subcontractor. Once again, the Department signaled to Prince and its subcontractors that their own standard classification codes for the type of work to be performed by Prince and their subcontractors would be used to determine the Adjusted Workers' Compensation Standard Premium under the Contract.

Prince followed and relied upon the Department's instructions and representations. Prince submitted to the Department the required "Suncoast Parkway Contractor Request for Supplemental Request for Insurance" form. In the forms, Prince correctly included, among other information, Prince's standard workers' compensation codes and rates applicable to the work, it contracted to perform on the Project. Prince's standard workers' compensation classifications were correctly shown as codes 0042, 5183, 5606, 6217, 8227, 8742 and 8810, the codes Prince's insurance agent

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has consistently applied to Prince for the same type of work as that Prince contracted to perform for the Project.

The Contract, at Art. 7-13.3.5(1), provides that Prince "should not commence work until [Prince and its subcontractors'] has submitted a properly completed Request for Insurance and the Department has approved [Prince and its subcontractors'] for participation in the insurance provided by the Department" pursuant to its OCIP. Prince submitted the appropriate request for insurance forms to the Department, and the Department approved the forms submitted by Prince, which contained the correct information based upon the Department's instructions. The Department approved Prince for participation in the OCIP insurance and issued to Prince, through Zurich American Insurance Company (Zurich), an OCIP workers' compensation insurance policy.

On January 5, 1999, Prince received its workers' compensation policy for the project, with a policy term of July 13, 1998, through June 17, 1999. The Policy was accompanied by a letter from the Department's OCIP claims administrator notifying Prince that the policy had been reviewed and was in order, with the exception that the "policy was issued with an incorrect ... work comp codes" The letter stated that the claims administrator had requested a correcting endorsement, which would be forwarded upon receipt. Prince subsequently received the referenced endorsement, correcting the policy, retroactively to the date of inception, to accurately reflect Prince's standard classification codes, consistent with the bid information and the Contract.

In about September 1999, several months after Prince's OCIP coverage term had ended, the Department performed a workers' compensation audit and retroactively changed Prince's classification from its standard codes to other non-standard classification codes. The new codes carried significantly higher workers' compensation rates than Prince's standard codes. The Department applied the classification change retroactively to the inception of the policy and assessed Prince an increased OCIP premium in the amount of \$40,397.55. This amount was withheld by the Department directly from Prince's pay estimates for work Prince performed on the Project.

Thus, Prince was charged a much higher premium for the OCIP workers' compensation insurance than the instructions and representations of the Department to Prince caused Prince to include in its bid. Prince reasonably relied upon the Department's instructions and representations and bid the Project utilizing an OCIP premium based upon 150% of its standard workers' compensation premium. Had Prince been informed by the Department that it was going to charge OCIP premiums based upon a classification other than Prince's standard classification, Prince could have bid the job using the increased OCIP premium rate, and no loss to Prince would have resulted. The Department did not do this, instead choosing to furnish Prince information which reasonably caused it to believe that Prince's OCIP premiums would be based upon Prince's standard workers' compensation codes and rates. The Department's decision to apply other codes than Prince's standard codes was a breach of the Contract and of the Department's implied covenant not to furnish misleading information to prospective bidders. Consequently, the Department is liable to Prince for the resulting difference in OCIP premiums assessed against Prince.

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On May 2, 2000, Prince received its renewal OCIP workers' compensation policy for the term commencing June 17, 1999, and ending June 17, 2000. Again, the policy was accompanied by a letter from the Department's OCIP claims administrator notifying Prince that a review of the policy had disclosed that "WC Code(s) 5183, 6217, 7380, 8227, 8601 and 8810 [the standard codes applicable to Prince] needed to be added" to the policy, and that "WC. Codes(s) '5222, 5506 and 5507, " which were not Prince's standard codes, needed to be deleted. The letter stated that a correcting endorsement had been requested and would be forwarded upon receipt. Prince subsequently received the referenced endorsement, retroactively correcting the policy to accurately reflect Prince's standard classification codes, consistent with the bid information and Contract requirements.

Nevertheless, after the coverage term ended, in about November 2000, the Department conducted a second workers' compensation audit and retroactively changed the classification codes of Prince's OCIP policy, applying codes other than Prince's standard codes. The Department applied the changed classification retroactively and assessed Prince additional OCIP premiums in the amount of \$28,836.32. The Department unilaterally withheld this sum from Prince's next pay request.

The Department's assessment and withholding of \$69,233.87 in additional OCIP premiums is a violation of the Contract, the Department's implied covenant not to furnish misleading information to bidders, and applicable provisions of the NCCI Basic Manual. Accordingly, by way of this Claim, Prince seeks a refund of the total amount of \$69,233.87 in overcharged OCIP premiums, together with interest at the statutory rate.

Swart's claim, Project Summary and OCIP Requirements Follow:

The Department awarded Prince, as the lowest responsible bidder, the general contract for the Project (the Contract). Prince and Swart's entered into a subcontract for the project whereby Swart's agreed to lay sod, seed and water along the medians and shoulders of the right-of-way. Pursuant to the subcontract, Swart's also agreed to perform hydromulcher operations. Swart's was not required to perform any work clearing or construction the right-of-way, and Swart's placement of sod was only on previously prepared land. Swart's has traditionally engaged solely in a sodding and seeding operation, which does not involve the clearing or construction of highways or other rights-of-way.

The Contract required Prince and certain subcontractors to Prince to participate in an Owner Controlled Insurance Program (OCIP). See Contract, Art. 7-13. Under the OCIP, the Department agreed to furnish certain types of insurance for Prince and its covered subcontractors, including workers' compensation insurance, and Prince and the covered subcontractors were required to participate in and pay premiums for the OCIP insurance furnished by the Department. See Contract, Art. 7-13.3, 7-13.3.1 (1) and 7-13.3.2. Swart's was one of the covered subcontractors furnished workers' compensation and other insurance by the Department under the Contract's OCIP.

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Thought the bid documents and pre-construction meetings the Department notified Prince and its subcontractors, including Swart's, that the premium for the OCIP workers' compensation insurance would be 150% of the adjusted workers' compensation standard premium. The Department made clear that the term "adjusted workers' compensation standard premium," as used in the Contract, denoted the standard premium applicable to the particular contractor or subcontractor. Consequently, Prince/Swart's was led to believe that the classification codes normally applied to their work by their own worker's compensation carrier would be used to determine Prince/Swart's OCIP premium. The Department bolstered this belief by instructing Prince and its subcontractors, including Swart's, to submit to the Department their standard workers' compensation codes and rates for their portion of the work. The Contract provided that the applicable premium for the OCIP insurance would be (150%) of the Adjusted Workers' Compensation Standard Premium... ."

These facts are evidenced in several documents. The Contract itself, at Art. 7-13.1.2, defines "the term adjusted Workers' Compensation Standard Premium" as "the Workers' Compensation Standard Premium for the Contractor and its Covered Subcontractors which would result, based on the jobsite payroll, with standard limits of liability ... after application of the experience modifications for the Contractor and its Covered Subcontractors" The Contract OCIP Premium is defined at Art. 7-13.1.3 as "an amount equal to one hundred and fifty percent (150%) of the Adjusted Workers' Compensation Standard Premium"

At a pre-construction meeting conducted by the Department and attended by Prince and Swart's, the Department described the OCIP program and answered questions. The Department clarified that the Adjusted Workers' Compensation Standard Premium was derived for each contractor and subcontractor individually. For example, the prime contractor's experience modification would not be applied to each individual subcontractor, but instead each subcontractor would use its own experience modification to determine the premium applicable to that individual subcontractor.

The Department also published and circulated an OCIP Manual, which contained additional information concerning the program and outlined the claims procedures. In order to allow the Department to make proper adjustments to estimated OCIP premium payments, the manual required the contractor and each covered subcontractor to submit original certified payrolls of wages paid to each Project employee on a monthly basis, containing the name and social security number of each employee and the correct workers' compensation classification. Each subcontractor was required to submit its own workers' compensation classification, again demonstrating that the standard workers' compensation classification applicable to each subcontractor and its work would be used to determine the OCIP premium for that subcontractor.

The Department also prepared Request for Insurance forms for submission by the contractor and each subcontractor. The supplemental request for insurance form prepared by the Department

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required Prince and each of its subcontractors to provide information concerning the subcontractor's current workers' compensation experience modification, and also the workers' compensation classifications, code and rate applicable to the specific type of work to be performed by the contractor or its subcontractor. Once again, the Department signaled to contractors and subcontractors that the normal classification code applicable to each subcontractor for the type of work to be performed by it would be used to determine the Adjusted Workers' Compensation Standard Premium under the Department's OCIP.

Swart's followed and relied upon the Department's instructions and representations. Swart's submitted to the Department the required "Suncoast Parkway Contractor Request for Supplemental Request for Insurance" form and "the Suncoast Parkway Supplemental Request for Insurance". In the forms, Swart's correctly included, among other information, Swart's standard workers' compensation codes and rates specifically applicable to the work it contracted to perform on the Project. Swart's workers' compensation classifications was correctly shown as code 5509, the code Swart's insurance carriers have consistently applied to Swart's for the same type of work as that Swart's contracted to perform for the Project. Indeed, two separate insurance carriers have approved the use of classification code 5509 for Swart's performance of this same type of work following extensive workers' compensation audits. Swart's also included its standard workers' compensation rate for the contracted work at \$9.04 per \$100.00 of payroll.

The Contract, at Art. 7-13.3.5(1), provides that no subcontractor to Prince, such as Swart's, shall commence work until a properly completed request for insurance form has been submitted by the subcontractor, and the Department has approved the subcontractor as a covered subcontractor. Swart's submitted the appropriate request for insurance forms to the Department, and the Department approved the forms submitted by Swart's, which contained the correct information based upon the Department's instructions. The Department approved Swart's as a covered subcontractor and issued to Swart's, through Zurich American Insurance Company (Zurich), an OCIP workers' compensation insurance policy containing the correct classification code 5509. The policy was issued for the term ending June 17, 1999. The Department knew the type of work Swart's had contracted to perform when it approved the forms and issued an OCIP policy incorporating the information contained in the forms, including Swart's appropriate classification code of 5509. The Department did not notify Swart's that it did not approve, or that it disagreed with, the classification code or rate provided by Swart's in its request for insurance forms.

Swart's reasonably relied upon the Department's instructions and representations and bid the project utilizing an OCIP premium based upon 150% of its standard workers' compensation premium, which in turn was, was based upon the 5509 classification code and a workers' compensation rate of \$9.04. Swart's paid premiums based on this classification and rate for the term of the policy.

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In about September 1999, several months after Swart's OCIP policy term ended, the Department performed a workers' compensation audit and retroactively changed Swart's classification code from 5509 to 0042. Code 0042 carries a significantly higher workers' compensation rate than code 5509, with a rate of \$16.77 per \$100.00 of payroll, as compared to Swart's standard rate of \$9.04. As a result the Department assessed Swart's an increased premium in the amount of \$13,217.05 based on the audit, and the increased premium was withheld directly from Swart's pay estimates for the work it performed on the Project. Accordingly, Swart's was charged a much higher premium for the OCIP workers' compensation insurance than the instructions and representations of the Department to Swart's caused Swart's to include in its bid. Also, the classification code of 0042 is not the standard workers' compensation code that Swart's own carrier applies to Swart's for the same type of work as that performed by Swart's for the Project. Moreover, it is not the appropriate code for the limited work performed by Swart's on this Project. Swart's sent correspondence to the Department's OCIP agent disputing the classification change and the OCIP overcharge.

Following the Department's audit in September 1999, up to and including the date of this claim, the Department continued to assess OCIP premiums against Swart's based upon the improper classification code of 0042, resulting in the Department overcharging Swart's and additional sum of \$12,094.22 in increased OCIP premiums. By way of this claim, Swart's seeks a refund of the total amount of \$25,311.42 in overcharged OCIP premiums, together with interest at the statutory rate.

Department's Position

In order to expedite the commencement of construction, Suncoast Request for Insurance forms, OCIP forms 1 and 2B, were received by the OCIP administrator. This permitted the issuance of the Certificate of Insurance and thereby allowed the contractors access to the jobsite. The forms were received on a good faith basis, subject to audit, to facilitate the implementation of the OCIP and prevent any delays in construction.

The Department charged rates that were appropriate under NCCI rules and class codes. Verification of payroll, class codes, and work was performed in compliance with NCCI and Department of Insurance standard practices and requirements.

The class codes utilized on other projects cannot automatically be applied to the Suncoast Parkway, as the classification is assigned based on the actual work performed for which the premium is being developed. The classifications, which might have applied to other work performed on other jobs by the contractor, would not be determinative of the correct classification to be applied to the work on the Suncoast Parkway.

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The Suncoast Parkway Project utilized an OCIP Insurance Program. The program and premiums are set forth in Article 7-13 of the Contract for Construction. The complete Specification is included in the Department's Notebook. In addition to the contract documents, the OCIP program was discussed at the pre-bid meeting.

Under the terms of the contract, prior to the commencement of construction, the contractor submitted to the Department the Request for Insurance forms, OCIP forms I and 2B. The forms were received on a good faith basis to permit the contractors access to the project. Prince submitted these forms. Upon review Zurich, the insurance carrier on the project, issued a policy to Prince with the correct class codes. Prince requested an adjustment to the class codes. In good faith, the OCIP Administrator complied with the request by Prince to adjust the class codes on their OCIP policy, to match those codes that were originally submitted. This was done subject to audit.

Under Article 7-13, the Contractors and Subcontractors were required to provide the Jobsite Payroll data by the correct NCCI classification. Further, under Article 7-13, the contract OCIP Premium was ultimately determined by applying the jobsite payrolls to the authorized rates for each of the applicable NCCI Workers' Compensation classifications reflected by the actual operations of the Contractors and Subcontractors.

"Adjusted Workers' Compensation Standard Premium" is defined in 7-13.12 as "...the Workers' Compensation Standard Premium for the Contractor and its covered Subcontractors which would result, based on Jobsite Payroll. . ." "Workers' Compensation Standard Premium" is defined in Art. 7-13.1.14 as "...the Standard Premium as defined in Rule VII.C.I. of the Basic Manual for Workers Compensation and Employers Liability Insurance issued by the National Council on Compensation Insurance.

Under Rule VII.C.I. of the Basic Manual for Workers' Compensation and Employers Liability Insurance issued by the NCCI, the standard premium was determined on the basis of "authorized rates" which were applied to the payrolls for the particular Workers' Compensation classifications. For work in Florida, the "authorized rates" are those rates filed in Florida by NCCI for the specific Workers' Compensation classifications established by NCCI. Rule IV of the NCCI Basic Manual addresses the specific rules with respect to the classifications.

The classifications for the Suncoast Parkway were assigned based on the actual work performed. Therefore, the classifications which might have applied to other work, performed on other jobs, by the same contractor would not be determinative of the correct classification to be applied to the work on the Suncoast Parkway.

Similarly, the fact that a previous insurer, whether intentionally or otherwise, failed to apply the proper classification to work performed by a particular contractor would not make that improper classification the "correct" classification. The use of such improper classification in connection with

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other work would not excuse a contractor from its obligation under Article 7-13 to certify payrolls using the "correct" classifications.

Verification by audit of payroll, class codes, and work was performed on either a semi-annual or annual basis. This is the standard practice in the insurance industry. Zurich performed their audits in compliance with NCCI and Department of Insurance standard practices and requirements. In fact, it would be illegal for the insurer, Zurich, to not follow the requirements of the NCCI Basic Manual. The Department, the contractors and the OCIP insurance carrier, Zurich, are obligated by state law to utilize the proper class codes for the Workers' Compensation policy.

The audits indicated that incorrect codes had been utilized by Prince and Swart's. This was verified by field auditors and their managers, as well as the NCCI. The activities and operations of Swart's were inspected by the NCCI. Attempts were also made to inspect the operations of Prince, however, they refused to comply with the requests of the field inspector.

Subsequent to the audit the class codes were corrected. The correction was made retroactive to the date the correct classification would have been applied had the correct classification been utilized. Rule IV.G.3 states that "any correction in classification arising from the discovery of a misrepresentation or omission, by the insured, its agent, employees, officers or directors, shall be applied pro rata from the date upon which it would have applied had such misrepresentation or omission not been made."

Department's Conclusion

The Department utilized the correct codes in accordance with the audits performed by Zurich and confirmed by NCCI. The Department further correctly applied the appropriate contract OCIP premium as set forth in the contract documents. No reimbursement of premium is due to Prince or Swart's.

Dispute Review Board Findings

Prince attended the pre-bid meeting during which the implementation of the OCIP provisions of the contract were discussed by the Department's representative who stated in part:

"I need to define a few terms that, like I said, are not in the typical FDOT contract. The first is the adjusted workman's comp premium. It is the workman's comp standard premium, including the contractor's experience modification.

...

Another term is the OCIP premium that each contractor and subcontractor will pay. It is the adjusted standard - the adjusted workman's comp standard premium times 150 percent. The reason that it's times 150 percent is because it includes not only your workman's comp premium but it also includes your general liability premium."

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Prince determined that their workman's compensation standard rate would be determined using the rates that had historically been applied to their work by their insurance carrier and bid the Project with that expectation. Thus, the Department got the advantage of a lower bid from Prince because they used classification codes and rates that they believed to be the workman's compensation standard premium when bidding the Project.

Prince submitted their proposed classification codes to the insurance carrier, Zurich, in order to obtain insurance for the project and be able to go to work on site. Zurich prepared a policy which indicated the classification codes for Prince's work were to be Class Codes 5222, 5506, 5507 and 5606. Zurich subsequently, on January 1, 1999, issued a letter stating that after review exceptions were noted and that a correcting endorsement would be issued. The statement in the letter is:

"Policy issued with an incorrect experience modifier, work comp codes and an incorrect Governing Law and Jurisdiction Endorsement."

The effective date of this policy is July 13, 1998, and is in effect until June 17, 1999. We note that the policy had already been in effect for approximately five and a half months when this letter was written. Subsequently, the Department issued a letter on October 29, 1999, which informed Prince and their covered subcontractor Swart's that they were being assessed additional costs of workers' compensation due to reclassification of payrolls. The letter stated:

Prince Construction:

There was a reclassification of payrolls to the appropriate codes. The plumbing code was adjusted to the sewer construction; the excavation, driver and engineering codes were changed to road construction classification. This brought about an additional premium of \$ 40,397.55 which was deducted from the past Monthly Estimate.

Swart's Landscaping:

The auditor for the insurance company has determined the proper classification code was (0042) Landscaping Gardening instead of the Highway Beautification class (5509). A copy of the Scopes Manual defining these codes is enclosed. The additional premium for Section 5 is \$ 13,217.05 and has been deducted from the past Monthly Estimate.

The Department defends the action of Zurich in reclassifying the workers' compensation codes and charging additional premiums by:

1. Stating that the specifications, specifically Article 7-13 of the Contract for Construction sets forth the premiums to be charged for workers' compensation insurance.
2. The OCIP program was discussed at the pre-bid meeting.
3. A policy was issued to Prince with the correct classification codes (5222, 5506, 5507, and 5606), which were changed at the request of Prince by the OCIP Administrator.
4. The changes to the classification codes were done subject to audit.

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The Department relies on their specifications:

Under Article 7-13, the Contractors and Subcontractors were required to provide the Jobsite Payroll data by the correct NCCI classification. Further, under Article 7-13, the contract OCIP Premium was ultimately determined by applying the jobsite payrolls to the authorized rates for each of the applicable NCCI Workers' Compensation classifications reflected by the actual operations of the Contractors and Subcontractors.

"Adjusted Workers' Compensation Standard Premium" is defined in 7-13.12 as "...the Workers' Compensation Standard Premium for the Contractor and its covered Subcontractors which would result, based on Jobsite Payroll. . ." "Workers' Compensation Standard Premium" is defined in Art. 7-13.1.14 as "...the Standard Premium as defined in Rule VII.C.I. of the Basic Manual for Workers Compensation and Employers Liability Insurance issued by the National Council on Compensation Insurance.

Under Rule VII.C.I. of the Basic Manual for Workers' Compensation and Employers Liability Insurance issued by the NCCI, the standard premium was determined on the basis of "authorized rates" which were applied to the payrolls for the particular Workers' Compensation classifications. For work in Florida, the "authorized rates" are those rates filed in Florida by NCCI for the specific Workers' Compensation classifications established by NCCI. Rule IV of the NCCI Basic Manual addresses the specific rules with respect to the classifications.

The Department contends that the audits indicated that incorrect codes had been utilized by Prince and Swart's and that this was verified by field auditors and their managers, as well as the NCCI. The activities and operations of Swart's were inspected by the NCCI. Attempts were also made to inspect the operations of Prince, however they refused to comply with the requests of the field inspector.

The Department also refers Rule IV-Classifications, Subsection 3. Misrepresentations or Omissions. Subsequent to the audit the class codes were corrected. The correction was made retroactive to the date the correct classification would have been applied had the correct classification been utilized. Rule IV.G.3 states that "any correction in classification arising from the discovery of a misrepresentation or omission, by the insured, its agent, employees, officers or directors, shall be applied pro rata from the date upon which it would have applied had such misrepresentation or omission not been made."

It is unclear whether Prince elected to use (on its own) the worker's compensation codes that it had historically used or whether it actually contacted its insurer (CNA) to have it quote the appropriate codes for this project. The affidavit of Dwight A. Wilson furnished on Prince's behalf does not say which of the worker's compensation codes is appropriate for the work on this project or that the FDOT misapplied the incorrect codes when the audit was performed.

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The affidavit of James Marshall, Jr. furnished on the Department's behalf states in part:

19. ...the Adjusted Workers' Compensation Standard Premium is developed in accordance with the NCCI rules, the reference in 7-13.3.2 to "the correct Workers' Compensation classification," clearly and unambiguously refers to the correct NCCI Workers' Compensation for the work actually performed on the Suncoast Parkway.

20. Because the classification is assigned based upon the work actually performed for which the premium is being developed, the classifications which might have applied to other work performed on other jobs by the contractor would not be determinative of the correct classification to be applied to the work on the Suncoast Parkway.

Without proof to the contrary that the Department applied the incorrect workers' compensation codes, it does not matter whether it was Prince or its insurer who determined which workers' compensation codes should be used in bidding the project. The Contract states:

7-13.1.14 Workers' Compensation Standard Premium: For the purposes of 7-13 the term Workers' Compensation Standard Premium means the Standard Premium as defined in Rule VII.C.1 of the Basic Manual for Workers' Compensation and Employers Liability Insurance issued by the National Council on Compensation Insurance (NCCI) for the Contractor and its Covered Subcontractors.

The Board finds that the correct classification codes for Prince's work are 5506, 5507 and 5606. The Board finds that the specifications left it up to the Contractors and subcontractors what classification codes they could expect to use when preparing their bids for work on this project. It would seem that if the correct codes for the General Contractor were so easily apparent the specifications should have listed those codes such that all the General Contractors bidding the project would have been bidding on a comparable basis.

Prince and Swart's have both alleged that even if the workers' compensation codes they used were incorrect that the Department could only make the classification changes retroactively during the first 120 days of the coverage term. They quote from the NCCI manual, page 9, which was last revised on 11/99, and discuss the Classifications as follows:

G. Changes or Corrections in Classifications

1. Changes in Classifications

Changes in classification due to changes in insured's operation will be applied pro rata as of the date of change in insured's operation

2. Corrections in Classifications

Corrections in classifications that result in a decrease in premium...

Corrections in classifications that result in an increase in premium shall be applied as follows:

- (a) During the first 120 days of the coverage term, retroactively to the inception of the coverage.
- (b) After the first 120 days of the coverage term, but before the final 90 days, pro rata as of the date the company endorses the insured's policy with such change.

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(c) During the last 90 days of the coverage, corrections in classifications will not be effected except upon a renewal policy, if any. The effective date of change on renewal policies is the date the carrier endorses the policy accordingly to effect the change in classification.

3. Misrepresentations or Omissions

Notwithstanding anything above to the contrary, any correction in classification arising from discovery of a misrepresentation or omission by the insured, its agent, employees, officers or directors, shall be applied pro rata from the date upon which it would have applied had such misrepresentation or omission not been made.

4. Construction or Erection

Construction or erection risks are subject to G.1. and G.2. above.

Exception

Due to the unique nature of such risks, it is required that the employer fully describe on the policy application the information such that all applicable classes may be determined. Any omissions, misleading statements, or misrepresentations in the description of the operation will allow classes to be added as of the effective date of coverage.

Prince makes the point that based upon 2.a and 2.b above Prince should not have suffered any change in premium because the corrections were not made until after the policy period, and that the insurer accepted their classification codes, and in fact, deleted the very codes that the insurer later determined were the correct codes.

The Department, on the other hand, makes the point that Prince misrepresented the classifications on their application and therefore, the correct classification codes 5506, 5507 and 5606 should be applied from the inception of the contract.

With respect to when the Department could assess Prince/Swart's for classification changes the Special Provisions of the Specifications are specific and state:

7-13.3.2 Contract Adjustments: In...

(3) Adjustment to Final Payment

(a) As a condition of receiving any final payment or retainage pursuant to 9-9, the Contractor and each of its Covered Subcontractors shall provide the Department with certified payrolls, setting forth in the manner prescribed by the Department, the payroll and other data reasonably necessary to enable the Department to calculate the Adjusted Workers' Compensation from commencement of the work until final acceptance of the Work.

(b) Based on the data provided in the certified Payrolls, the Department shall calculate the Adjusted Workers' Compensation Standard Premium from commencement of the work until final acceptance of the work.

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(c) The final payment otherwise due the Contractor shall be adjusted by the amount equal to the difference between:

1. one hundred and fifty percent (150%) of the Adjusted Workers' Compensation Standard Premium from commencement of the work until final acceptance of the Work, and,
2. the sum of those amounts by which the Contract has previously been adjusted pursuant to 7-13.3.2(1) and 7-13.3.2(2)

Swart's

Swart's makes the same arguments concerning the classification codes made by Prince with some notable exceptions as described below.

Swart's apparently did some hydromulching which is classified as workers' compensation code 5509 as described in the Scopes Manual, issued July 1999, page 274 (Exhibit "J" in Swart's claim book). Workers' compensation code 5509 is described as follows:

PHRASEOLOGY FL-STREET OR ROAD MAINTENANCE OR BEAUTIFICATION & DRIVERS

No construction. Applicable to any or all of the following operations: laying out of grounds preliminary to planting, including incidental leveling or grading; planting of right-of-way; weed or grass cutting; repair or maintenance of culverts; erection or removal of road markers, signs or guardrails; road marking; dust laying; brush removal. Not applicable to projects which involve clearing of the right-of-way; excavation, filling or grading of the roadbed; the construction or reconstruction of the roadbed or the base or foundation of the roadway; the widening or relocation of the roadbed; paving or repaving; surfacing, resurfacing or scraping of streets or roads. Such operations shall be assigned to 5506, 5507, or 5508 - Street or Road Construction. SCOPE This code is applicable to operations described above including contractors who operate a truck-mounted hydromulcher which will chop hay or straw, mix it with grass seed and water and shoot it out along roadsides and embankments;

Workers' compensation code 0042 is described (Exhibit N to Swart's claim) as follows:

PHRASEOLOGY LANDSCAPING GARDENING & DRIVERS.

Includes laying out grounds, planting trees, shrubs, flowers or lawns ... Florida-Landscaping Gardening & Drivers-includes laying out grounds, planting trees, shrubs, flowers or lawns. ...Also this classification covers sodding, seeding, planting and similar work necessary for the beautification of roadsides in connection with street or road construction, by whomsoever performed. ...Code 0042 is applicable to work involving new landscaping installations.

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Swart's present insurance carrier indicates that Swart's has undergone an extensive audit of their operations within the past year which verified the workers' compensation code "5509 reflects the proper classification to the job endeavor. In addition, the code 5509 was also used by their prior carrier, FCCI Mutual Insurance Co." (Exhibit "F" in Swart's claim) While this letter goes on to state that, "It is our belief the class code 5509 best describes their function which has been verified by two workers compensation insurance companies' audits. Any change in the classification code without a change by Swart Landscaping endeavor would be a misrepresentation of their business." the letter does not, however, state that the classification code used by the Department and Zurich was incorrect.

The Board finds that the correct classification code for Swart's work is 0042 except for any hydromulching which Swart's may have done and the correct classification code for hydromulching is 5509. Swart's had used workers' compensation code 0042 on projects in the past, but have recently been using code 5509. When asked why they began using classification code 5509 rather than code 0042 the answer was that it had only recently become available. Classification code 5509 has been available since 1937, however, recent revisions to the code such as adding the hydromulcher could account for Swart's beginning to use that code for their work.

Dispute Review Board Recommendation

The Board, after careful consideration of the specifications, written packages, additional information requested by the Board and the oral presentations made by both parties, makes the following majority recommendation (See attached Dissenting Opinion).

The Special Provisions of the Specifications, Article 7-13.3.2.3 Contract Adjustment to Final Payment is very specific and states as follows:

(3) Adjustment to Final Payment

(a) As a condition of receiving any final payment or retainage pursuant to 9-9, the Contractor and each of its Covered Subcontractors shall provide the Department with certified payrolls, setting forth in the manner prescribed by the Department, the payroll and other data reasonably necessary to enable the Department to calculate the Adjusted Workers' Compensation from commencement of the work until final acceptance of the Work.

(b) Based on the data provided in the certified Payrolls, the Department shall calculate the Adjusted Workers' Compensation Standard Premium from commencement of the work until final acceptance of the work.

(c) The final payment otherwise due the Contractor shall be adjusted by the amount equal to the difference between:

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1. one hundred and fifty percent (150%) of the Adjusted Workers' Compensation Standard Premium from commencement of the work until final acceptance of the Work, and,
2. the sum of those amounts by which the Contract has previously been adjusted pursuant to 7-13.3.2(1) and 7-13.3.2(2)

The majority of the Board find that the NCCI Manual is equal to the Special Provisions, especially in light of the Department's recognition that the NCCI Manual has equal precedence to the Special provisions. The Board must then look at the provisions of the NCCI Manual. The NCCI Manual under Special Rules, Rule IV-Classifications, Paragraph G states:

G. Changes or Corrections in Classifications

1. Changes in Classifications

Changes in classification due to changes in insured's operation will be applied pro rata as of the date of change in insured's operation

2. Corrections in Classifications

Corrections in classifications that result in a decrease in premium...

Corrections in classifications that result in an increase in premium shall be applied as follows:

(a) During the first 120 days of the coverage term, retroactively to the inception of the coverage.

(b) After the first 120 days of the coverage term, but before the final 90 days, pro rata as of the date the company endorses the insured's policy with such change.

(c) During the last 90 days of the coverage, corrections in classifications will not be effected except upon a renewal policy, if any. The effective date of change on renewal policies is the date the carrier endorses the policy accordingly to effect the change in classification.

3. Misrepresentations or Omissions

Notwithstanding anything above to the contrary, any correction in classification arising from discovery of a misrepresentation or omission by the insured, its agent, employees, officers or directors, shall be applied pro rata from the date upon which it would have applied had such misrepresentation or omission not been made.

4. Construction or Erection

Construction or erection risks are subject to G.1. and G.2. above.

Exception

Due to the unique nature of such risks, it is required that the employer fully describe on the policy application the information such that all applicable classes may be determined. Any omissions, misleading statements, or misrepresentations in the description of the operation will allow classes to be added as of the effective date of coverage.

While the Specifications, Article 7-13.3.2.3 Contract Adjustment to Final Payment is very specific it must be read in conjunction with Rule IV-Classifications, G.2 which details how and when the classifications may be changed, and if the classifications are to be changed they must be changed within these parameters. If as the Department has indicated, the NCCI Manual and the Special

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Provisions have equal precedence, then it could also be said that there is an ambiguity between Article 7-13.3.2.3 Adjustments to Final Payment and the NCCI Manual under Special Rules, Rule IV-Classifications, Paragraph G.2.a, b and c. An ambiguity should not be assessed against the contractor, but against the drafter of the specifications. The Department's Insurance carrier did not change the classifications within the stated parameters, and in fact, did not change the classifications until after the expiration of the first policy period.

The Department makes the statement that the classification codes were misrepresented and therefore the Department's and the Insurance Carrier's enforcement of the correct classification codes from the start of the policy period is proper. The Board does not feel that Prince "misrepresented" according to the usual definition:

(to represent falsely; give an untrue or misleading idea of)

the classification codes that Prince felt were the proper codes for their work. In fact, the instructions for completing Form 1 bolster the belief that Prince/Swart's will be able to use the classification codes they normally use. The instructions state as follows:

- Classification: List industry classification descriptions that apply to your work. This can be obtained from your current policy or insurance agent.
- Code: List industry classification code numbers that apply to your work. This can be obtained from your current policy or insurance agent.
- Current Rate: List the rate that applies to each classification code. Obtain this from your insurance agent to make certain the rate is correct.

Further, it would make no sense for Prince to purposely indicate classification codes which could be audited and changed with the resultant increase in premium (decrease in profit).

The Majority finds entitlement to Prince's position for the first policy period, but because they were informed of the changed classification codes on the September, 1999, pay estimate the Department was correct under the NCCI Manual, Special Rules, Rule IV-Classifications, Paragraph G.2.a in assessing the correct classification codes from the start of the second policy period to the completion of the project.

The Majority finds entitlement to Swart's position (in the same manner) only if they were not previously audited on another Section of the Suncoast Parkway prior to being awarded this contract. Had they been previously audited they would have known the classification code, or codes, that would be charged for their work and should have used them at the time they accepted award of this project. Swart's does have entitlement where hydromulching was misclassified as workers' compensation code 0042 throughout the complete project time.

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This recommendation is based upon the specific circumstances particular to this project and applies only to this project, Section 5 of the Suncoast Parkway.

The Board wishes to thank all who participated in the hearing on this issue and to remind everyone that each side has fifteen days within which to accept or reject the above recommendation. If no answer is received within fifteen days the Board will consider the recommendation accepted.

Signed with concurrence of all members

John C. Norton, Chairman
John H. Duke Senior
Ashley R. Cone

DISSENTING MEMBER FINDINGS:

- It is unclear whether Prince elected to use (on its own) the worker's comp codes that it had historically used or whether it actually contacted its insurer to have it quote the appropriate codes for this project.
- The affidavit of Dwight A. Wilson furnished in Prince's behalf in part states:
 3. *Prince Contracting Co., Inc. is a client of M.E. Wilson, and I have worked with Prince Contracting since 1998. M.E. Wilson has obtained workers compensation insurance for Prince Contracting from CNA since 1998. CNA has assigned the workers compensation class codes of 5183, 6717, 5606, 8601, 7380, 8227, 8810, and 5909 to the work performed by Prince. CNA has audited the work performed by Prince Contracting and has approved these class codes as the appropriate and correct codes.*

The affidavit **does not say which of the above codes is appropriate on this project** or that the FDOT misapplied the incorrect code when the audit was performed.

The Board does not believe that Prince purposely and knowingly misrepresented the codes it honestly believed should be applied to its work.

- The Contract states:
 - *7-13.1.14 Workers' Compensation Standard Premium: For the purposes of 7-13, the term Workers' Compensation Standard Premium means the Standard Premium as defined in Rule VII.C.1 of the Basic Manual for Workers Compensation and Employers Liability Insurance issued by the National Council on Compensation Insurance (NCCI) for the Contractor and its Covered Subcontractors.*
 - *7-13.3.2 Contract Adjustments: In...*
 - (2) *Adjustment to Subsequent Estimates*
 - (a) *As a condition to receiving any estimate pursuant to 9-6 subsequent to the first estimate, the Contractor and each of its Covered Subcontractors shall furnish each*

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week in which any Work is performed, to the Engineer, an original certified payroll of wages paid each of its Project Employees. The payroll submitted shall set out accurately and completely all the information required to calculate the cumulative Adjusted Worker's Compensation Standard Premium. The payroll submitted shall contain the name, social security number, and address of each Project Employee, the correct Workers' Compensation classification, hourly rate of wages paid, daily and weekly hours worked on the Contract, gross wages paid each Project Employee, and the total gross wages paid for each Workers' Compensation classification...

- The affidavit of James Marshall, Jr. furnished in the Department's behalf in part states:
 19. *...the Adjusted Workers' Compensation Standard Premium is developed in accordance with the NCCI rules, the reference in 7-13.3.2 to "the correct Workers' Compensation classification," clearly and unambiguously refers to the correct NCCI Workers' Compensation classification for the work actually performed on the Suncoast Parkway.*
 20. *Because the classification is assigned based on the actual work performed for which the premium is being developed, the classifications which might have applied to other work performed on other jobs by the contractor would not be determinative of the correct classification to be applied to the work on the Suncoast Parkway.*

Absent proof to the contrary that the FDOT applied the incorrect codes, it is not germane to the issue as to whether it was Prince or its insurer who determined which codes should be used in bidding the project. The Contract states:

- *7-13.1.14 Workers' Compensation Standard Premium: For the purposes of 7-13, the term Workers' Compensation Standard Premium means the Standard Premium as defined in Rule VII.C.1 of the Basic Manual for Workers Compensation and Employers Liability Insurance issued by the National Council on Compensation Insurance (NCCI) for the Contractor and its Covered Subcontractors.*

The FDOT applied the correct classification codes for Prince's work on this project, i.e. 5506, 5507 and 5606.

As to whether the Department could only implement the classification changes retroactively during the first 120 days of the coverage term, the Board must look again to the Contract which states:

- *7-13.3.2 Contract Adjustments: In...*
 - (3) *Adjustment to Final Payment*
 - (a) *As a condition to receiving any final payment or retainage pursuant to 9-9, the Contractor and each of its Covered Subcontractors shall provide the Department with certified payrolls, setting forth in the manner prescribed by the Department, the payroll and other data reasonably necessary to enable the Department to calculate the Adjusted Workers' Compensation from commencement of work until final acceptance of the Work.*
 - (b) *Based on the data provided in the certified payrolls, the Department shall calculate the Adjusted Worker's Compensation Standard Premium from commencement of work until final acceptance of the work.*

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(c) *The final payment otherwise due the Contractor shall be adjusted by the amount equal to the difference between:*

1. *one hundred and fifty percent (150%) of the Adjusted Workers' Compensation Standard Premium from commencement of work until final acceptance of the Work, and,*
2. *the sum of those amounts by which the Contract has previously been adjusted pursuant to 7-13.3.2(1) and 7-13.3.2(2)*

The Department has stated that the NCCI Manual is incorporated by reference. While specific sections may be incorporated, it is not clear to this writer that the entire Manual is incorporated into the Contract. Certainly, there is no specific reference to NCCI Manual Special Rules, Rule IV-Classifications, Paragraph G in the Special Provisions of the Contract. If Rule IV G is incorporated - there would exist an ambiguity. Normally, the Special Provision language would make reference to deletion of this paragraph and insert the language pertaining to 7-13.3.2 - Contract Adjustments, if the NCCI Manual was incorporated in total.

The Contractor supplied payrolls that contained incorrect Workers' Compensation classifications. The Department corrected these classifications. Absent State or Federal Law that mandates the period available for adjustment in the premium, this writer finds that the language of the above Special Provision overrides the language contained in NCCI. Therefore, the premium may be adjusted retroactively to day one of the Contract.

As to Swartz's claim, the same rationale applies.

DISSENTING RECOMMENDATION:

While this writer may find no entitlement to the Contractor's or Subcontractor's position, he does recommend that the Department accept the Majority's Recommendation in order to draw to a close this esoteric issue.