

Henry Bacon Building Materials

ASSESSMENTS

Classification of business

Although an assessment on appeal does not involve a reclassification, the Board will consider any of the factors the Department addressed in calculating assessment, including whether the appropriate classification was used during the audit period. **...In re Henry Bacon Building Materials, BIIA Dec., 90 0656 (1992)** [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 92-2-02279-3.]

SCOPE OF REVIEW

Assessments

In an assessment appeal where the assessment does not involve a reclassification, the Board will consider any of the factors the Department addressed in calculating assessment, including whether the appropriate classification was used during audit period. To go beyond the audit period would be an unwarranted expansion of the Board's jurisdiction and would intrude on the Department's initial underwriting and risk classification decisions. **...In re Henry Bacon Building Materials, BIIA Dec., 90 0656 (1992)** [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 92-2-02279-3.]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: HENRY BACON BUILDING) DOCKET NO. 90 0656**
2 **MATERIALS, INC.**

3)
4 **FIRM NO. 195, 27-00) DECISION AND ORDER**
5 _____)

6 **APPEARANCES:**

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8 Firm, Henry Bacon Building Materials, Inc., by
9 Lane, Powell, Spears, Lubersky, per
10 Ralph C. Pond and Neil Cable
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12 Department of Labor and Industries, by
13 Francis Romero, Manager, Classification Development Section;
14 The Office of the Attorney General, per
15 Shawn Ruth, Legal Examiner, Kim Studeman, Paralegal, and Elizabeth Berns, Law Clerk, and
16 Penny Allen, Maureen Mannix, Kristian F. Kofoed,
17 Jeffrey P. Bean, and Byron L. Brown, Assistants
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19 This is an appeal filed by the firm, Henry Bacon Building Materials, Inc., on February 5, 1990
20 from a Notice and Order of Assessment of the Department of Labor and Industries dated
21 January 8, 1990. Notice and Order of Assessment No. 77975 assessed taxes due the State Fund
22 accruing between July 1, 1987 and December 31, 1987, and January 1, 1989 through
23 March 31, 1989, in the amount of \$ 21,580.54, and demanded payment of the assessed amounts.
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25 **AFFIRMED.**

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28 **PROCEDURAL AND EVIDENTIARY MATTERS**

29 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
30 and decision on a timely Petition for Review filed on behalf of the Department of Labor and Industries
31 to a Proposed Decision and Order issued on January 14, 1992 which reversed the Department's
32 Notice and Order of Assessment dated January 8, 1990, and remanded the matter to the Department
33 with direction to classify wholesale and retail operation of Henry Bacon Building Materials, Inc. under
34 Classification 6309 and to re-compute the assessment of industrial insurance premiums for the
35 three-year period preceding January 8, 1990. The Board has reviewed the evidentiary rulings in the
36 record of proceedings and in the Proposed Decision and Order and finds that n prejudicial error was
37 committed and said rulings are hereby affirmed.
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43 **DECISION**

44 While in its broadest sense we agree with our industrial appeals judge's statement of the issue
45 presented by this appeal, we are limited to consider this issue in context of the Notice and Order of
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1 Assessment which is the subject of this appeal. Notice and Order of Assessment No. 77975 concerns
2 assessment of industrial insurance taxes for the periods of July 1, 1987 through December 31, 1987
3 and January 1, 1989 through March 31, 1989. Our jurisdiction to consider the appropriateness of
4 these assessments and the risk classifications upon which the assessments were based is limited to
5 the period covered under the Notice and Order of Assessment. We do not have jurisdiction to
6 consider the assessment of premiums or the classification of Henry Bacon Building Materials, Inc. for
7 any periods other than those covered specifically in the Notice and Order of Assessment and certainly
8 for no period following March 31, 1989. The audit which gave rise to the Notice and Order of
9 Assessment currently on appeal covered the third and fourth quarters of 1987 and the first quarter of
10 1989. For these periods the Department assessed additional premiums in the amount of \$21,580.54.
11 The additional premiums which were assessed did not address classification of Henry Bacon Building
12 Materials, Inc. as a single enterprise, but rather addressed under-reporting of certain hours by means
13 of the use, during 1989, of Class 4904, clerical office workers. The audit required those workers with
14 clerical duties to be included under Class 6309, hardware stores, electrical hardware dealers, and
15 garden supplies stores. As the latter class specifically includes clerical, office and sales personnel, it
16 was not proper for these personnel to be reported separately in Class 4904. Accordingly, with the
17 exception of the hours incorrectly reported under Class 4904, which should have been reported under
18 Class 6309, the Department has assessed premiums during the periods covered under the Notice and
19 Order of Assessment in accordance with the classifications reported on the employer's own quarterly
20 reports. The Department's audit corrected only that portion of the employer's reporting scheme that
21 utilized Class 4904. Otherwise, Henry Bacon was allowed, during the audit period in issue, to report
22 some of its retail personnel under Class 6309, hardware stores, and others under Class 1103, lumber
23 yards.

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On July 1, 1989, subsequent to the periods covered by the Notice and Order of Assessment, the Department apparently determined that Class 6309 was not appropriate for any of the business conducted by Henry Bacon Building Materials, Inc., and apparently required it to report prospectively, for its entire business enterprise, under Class 1103, lumber yards and building material dealers. Prior to this time at least a portion of Henry Bacon's business had been conducted under a separate entity owned by Henry Bacon, but operated independently, and known as Northwest Builders. Those employees were properly reported under Classification 6309. Northwest Builders merged with Henry

1 Bacon, becoming a single enterprise. As a single enterprise the Department concluded that Henry
2 Bacon should continue to report in Class 1103 and that it could no longer use Class 6309.
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4 By this appeal the employer, Henry Bacon, is challenging its classification under Class 1103 as
5 a lumber yard or building material dealer and contending that its entire operation, both for the period of
6 the audit and into the future, should be classified under Class 6309, as a hardware store. It is Henry
7 Bacon's contention that the nature of its enterprise is no longer described by Class 1103, lumber yard,
8 and to the extent that the Department determined that Class 1103 is proper, it is in error. Henry Bacon
9 wants those workers assigned to Class 1103 for the period of the audit to be reclassified under Class
10 6309 which would have the effect of reducing the retroactive premiums owed. The principal thrust of
11 the arguments advanced on behalf of Henry Bacon is that there exists no current classification which
12 accurately describes its business as it has developed in recent years, and under WAC 296-17-360 a
13 classification should be assigned by analogy after considering both process and hazard. If just
14 process and hazard are considered, Henry Bacon contends that its operation is most analogous to the
15 types of business classified under Class 6309 which includes hardware stores, electrical hardware
16 dealers, and garden supply stores, among others. WAC 296-17-704.
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24 The Department of Labor and Industries has raised objection to the jurisdiction of the Board to
25 determine the proper classification of Henry Bacon, as the assessment on appeal does not involve a
26 reclassification. We disagree with the Department's interpretation and are confident that once an
27 assessment has been issued we have jurisdiction to consider any of the factors which gave rise to that
28 assessment, including the appropriate classification of the business covered by the assessment. If the
29 Department has incorrectly classified Henry Bacon during the periods covered by the audit leading to
30 the Notice and Order of Assessment, we have the authority to reclassify the firm appropriately. The
31 Department raises another contention, with which we agree, that only the classification of Henry
32 Bacon Building Materials during the period covered by the Notice and Order of Assessment is at issue
33 in this appeal. As the Notice and Order of Assessment deals with the specific audit period of
34 July 1, 1987 through December 31, 1987 and January 1, 1989 through March 31, 1989, we are limited
35 to determining the appropriate classification for the employer during that period. We will not consider a
36 prospective classification which goes beyond the audit period. This would be an unwarranted
37 expansion of our jurisdiction as a quasi-judicial reviewing tribunal, and would intrude on the
38 administrative duties of the Department's employer services division in making initial underwriting and
39 risk classification decisions.
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1 The bulk of the evidence presented on behalf of the employer was devoted to establishing the
2 appropriate classification of its business based upon analogy. WAC 296-17-360 provides that this
3 shall be done by comparing the process and hazard involved in the employer's operation with the
4 process and hazard involved in various classifications. Based upon that comparison, a classification
5 would be selected and assigned which described operations involving similar process and hazard. If
6 this type of comparison were appropriate, the employer's activities might very well fall within either
7 Class 1103 or Class 6309. This argument advanced on behalf of the employer, however, begs the
8 question, as the Department's evidence convinces us that it is unnecessary to utilize analogies
9 because there is a classification which describes the employer's principal business during the period in
10 issue.
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12 As pointed out in the employer's evidence, there are similarities between Henry Bacon, Pay 'N'
13 Pak, and the Home Club in the manner in which they conduct their businesses and the type of
14 products that they offer to the public. But there are significant differences which are more convincing
15 when compared to the similarities. Careful review of the record convinces us that Henry Bacon has,
16 as its principal activity, the sale of lumber and building materials. While also selling a number of
17 hardware items, it is clear that the principal business activity is as a lumber yard and building material
18 dealer. Pay 'N' Pak and the Home Club, on the other hand, principally sell hardware items and only
19 incidentally sell lumber and building materials. The record establishes that Pay 'N' Pak, which is
20 classified under Class 6309, has extensive inventories of electrical supplies and hardware, and garden
21 supplies, items which are specifically described in that classification and which are not sold, or are only
22 sold in limited quantities, by Henry Bacon. We believe the Department has acted correctly and
23 classified Henry Bacon Building Materials, Inc. in accordance with the provisions of WAC 296-17-
24 310(2) and (7), WAC 296-17-380, and WAC 296-17-390. Because a specific classification exists,
25 WAC 296-17-538, Classification 1103, which describes the principal activity and business enterprise of
26 the employer, assignment of classification by analogy under WAC 296-17-360 is not appropriate or
27 relevant.
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29 We wish to comment that, while we cannot provide the employer with the relief requested
30 under the guise of deciding this appeal, we do recognize the marketing changes that have taken place
31 in recent years in the "home improvement" business. That is rather obvious from simple day-to-day
32 observance of these enterprises at various business districts and shopping malls. The similarities that
33 exist between the business conducted by Henry Bacon and those conducted by others such as Home
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1 Base and Pay 'N Pak are noticeable. On the other hand, the marketplace still contains many
2 businesses operating in the more traditional mode, immediately discernible as a "hardware store" or
3 as a "lumber yard". As a reviewing body, we are not in a position, in the first instance, to alter the risk
4 classifications which have been established by the Department. However, the Department has the
5 right and authority to do so, and to establish new classifications in light of changes in business
6 activities over time which may affect their degree of hazard. RCW 51.16.035. In light of the rapid
7 growth of the "super market" type of home improvement centers, it may be appropriate for the
8 Department and its Classification Development Section to consider establishing a classification
9 applying to this type of comprehensive "everything for the home" business enterprise.

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11 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto
12 on behalf of the Department of Labor and Industries, and the Employer's Response to Petition for
13 Review, and a careful review of the entire record before us, we are persuaded that in this particular
14 case under the existing classifications and rules, the Department's Notice and Order of Assessment is
15 correct and must be affirmed.

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17 Proposed Finding of Fact No. 1 and proposed Conclusion of Law No. 1 are hereby adopted as
18 this Board's final finding and conclusion. In addition, the Board enters the following finding and
19 conclusions:
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22 **FINDINGS OF FACT**

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28 2. During the periods July 1, 1987 through December 31, 1987, and
29 January 1, 1989 through March 31, 1989, Henry Bacon Building Materials,
30 Inc. was engaged principally in business as a lumber yard and building
31 materials dealer. During these periods the sale of hardware items was
32 incidental to their principal business activity as a lumber and building
33 materials dealer.

34 **CONCLUSIONS OF LAW**

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36 2. The nature of the business of Henry Bacon Building Materials, Inc., as
37 existing during the audit period here in issue, is described by a specific
38 classification and is appropriately classified as a lumber yard or building
39 materials dealer within the meaning of WAC 296-17-538, Classification
40 1103.
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42 3. The Notice and Order of Assessment No. 77975, issued by the
43 Department of Labor and Industries on January 8, 1990 assessing taxes
44 due the State Fund accruing between July 1, 1987 and
45 December 31, 1987, and January 1, 1989 through March 31, 1989, in the
46 amount of \$ 21,580.54 and which demanded payment of that amount, is
47 correct and is hereby affirmed.

