



E. Scott Treadway
Attorney at Law
streadway@tabberthahn.com

August 9, 2004

VIA FACSIMILE AND UNITED STATES MAIL

Steven A. Pletcher, Esq.
Scopelitis, Garvin, Light & Hanson, P.C.
Indiana Department of Insurance
311 W. Washington Street, Suite 300
Indianapolis, IN 46204-2787

Re: *JDC Associates*
Application No. 35-1925519

Dear Mr. Pletcher

We are in receipt of your letter dated June 22, 2004, addressed to the Indiana Compensation Rating Bureau (the "ICRB") concerning JDC Associates ("JDC") and WorkSmart Systems, Inc. ("WorkSmart"). The letter raises various issues concerning the application of certain Indiana statutes and the Basic Manual Rules for workers' compensation insurance (the "BMR") to professional employment organizations ("PEOs"). On behalf of the ICRB, we hereby provide the following response to your letter.

According to your letter, WorkSmart is a PEO that obtains worker's compensation insurance coverage in the voluntary market. WorkSmart desires to contract with JDC for the co-employment of individuals who are currently employed by JDC. Unlike the usual co-employment relationship with a PEO, JDC desires to maintain worker's compensation insurance coverage separate and apart from WorkSmart. However, JDC has been unable to obtain worker's compensation insurance coverage in the voluntary market, which resulted in JDC applying for such coverage in the residual market.

The ICRB denied JDC's application for residual market coverage based on the BMR and Indiana law. Specifically, the ICRB applies the unified rule regarding participation in the residual market for worker's compensation insurance coverage in the State of Indiana (the "Unified Rule"). According to the Unified Rule, an employer may not obtain worker's compensation insurance coverage for certain employees in the voluntary market and obtain such coverage for other employees in the residual market. Instead, an employer must obtain all workers' compensation insurance coverage in the voluntary market or all such coverage in the residual market.

TABBERT HAHN EARNEST & WEDDLE, LLP
ATTORNEYS AT LAW

ONE INDIANA SQUARE / SUITE 1900 / INDIANAPOLIS, IN 46204-2032 / (317) 639-5444 / FAX (317) 639-5232
email: thew@tabberthahn.com

The requested structure of the relationship by and between WorkSmart and JDC in your letter directly contravenes the Unified Rule. In essence, ~~WorkSmart would constitute an employer that obtained worker's compensation insurance coverage in both the voluntary market and the residual market.~~

JDC has requested that the ICRB reconsider the ICRB's previous position. JDC has requested that the ICRB provide JDC with residual market coverage even though JDC participates in a co-employment relationship with WorkSmart. The ICRB has considered the issues in your letter and during multiple conversations by and between you and Ron Cooper, the President of the ICRB ("Cooper"), concerning this topic. However, the ICRB is unable to reverse the ICRB's previous position for the following reasons:

- The ICRB has always required an employer to be completely in or completely out of the residual market under the Unified Rule. See BMR 3(A)(5)(b). An employer cannot select certain employees or certain classes of employees to obtain worker's compensation insurance coverage in the residual market. This Unified Rule is also consistent with Ind. Code §22-3-5-5, which is discussed in more detail hereinafter.
- A PEO is not treated differently than other employers in the State of Indiana. Other Indiana employers are prohibited under the Unified Rule from segregating employees by class or forming a separate legal entity for classes of employees to seek multiple policies or seek voluntary or involuntary market worker's compensation insurance coverage. If the Unified Rule were not enforced, the opportunity for abuse and experience manipulation would be enormous.
- The system proposed in your letter is tantamount to asking the ICRB to adopt preferential rules for PEOs. Historically, the ICRB has not created preferential rules for the PEO industry. The ICRB does not believe that adoption of a rule that would provide PEOs preferential treatment is justified or necessary.
- The ICRB's position is neither arbitrary nor capricious. In fact, the ICRB's position is longstanding and consistent with the BMR and Indiana law.
- JDC specifically challenges Rule 3(D) of the BMR. Rule 3(D) applies only to residual market policies obtained by employee leasing arrangements and PEOs. Rule 3(D) requires a PEO that participates in the residual market to obtain a policy on behalf of each individual client and the PEO on a multiple coordinated policy basis ("MCP"). The ICRB has uniformly applied Rule 3(D) to all PEOs that obtain residual market worker's compensation coverage. Rule 3(D) does not

allow a PEO to segregate certain employees or classes of employees. All such employees must be insured on a MCP basis. This MCP basis requirement is consistent with the Unified Rule, which requires all employees of an employer to be insured in either the voluntary market or the residual market.

- The relationship proposed by JDC and WorkSmart is also contrary to Ind. Code §22-3-5-5, which provides as follows:

All policies of insurance companies and of reciprocal associations insuring the payment of compensation under IC 22-3-2 through IC 22-3-6 are conclusively presumed to cover all the employees and the entire compensation liability of the insured. **Any provision in any policy attempting to limit or modify the liability of the company or association issuing the same shall be wholly void.**

(Emphasis added). Ind. Code §22-3-5-5 does not allow a PEO to pick and choose which employees to insure in the residual market and which to insure in the voluntary market.

- Under the approach suggested in your letter, a voluntary market carrier would be providing worker's compensation insurance coverage to a PEO that would not "cover all the employees and the entire compensation liability of the insured." Such attempted limitation or modification to a worker's compensation insurance policy would arguably be void under Indiana law. In turn, under Ind. Code §22-3-5-5, an individual employee of a PEO might take the position that he or she is free to select coverage in either the voluntary market or the involuntary market. Underwriting such a risk would be extremely difficult if not impossible.
- Industry experts have theorized that PEOs were created in part to avoid the adverse prior experience, which is used in part to determine worker's compensation premiums. The ICRB has been careful to adopt rules and policies to discourage such conduct. Rule 3(D) of the BMR was adopted to discourage such conduct.
- You suggest in your letter that the ICRB's position is contrary to Ind. Code §22-3-3-31. However, your position is not well founded. The aforementioned statute relates to liability for the payment of benefits to an injured employee, not the issue at hand.
- The ICRB has in no way interfered with the ability of JDC to join a PEO. However, JDC must follow the rules applicable to every employer in the State of Indiana.

- Moreover, the ICRB has no control over the ability of JDC to obtain voluntary market coverage. The decision to provide voluntary market coverage to JDC is a purely private decision made by insurance carriers.
- In your letter, you make vague assertions that the current system violates the Equal Protection Clause. However, you fail to cite any authority for this proposition. The ICRB does not agree with your position. In fact, you appear to be complaining about the ICRB treating all employers and employees equally. What your client seeks is unequal and different treatment.
- The rules of the ICRB are straightforward and consistently applied. If JDC elects to create a co-employee relationship between its employees and another company, all employees must be insured under one policy. The same would be true for any two (2) employers who jointly employ Indiana employees.

If you have any further questions or comments, please contact me at your earliest convenience.

Very Truly Yours,

TABBERT HAHN EARNEST & WEDDLE LLP


E. Scott Treadway, Esq.

cc: Ron Cooper
Robert S. Daniels, Esq.