BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE

RECEIVED
2012 MAR 30 AM 11:02
SECRETARY OF STATE

IN THE MATTER OF:	)	
	)	
PRO CHARGING SYSTEMS, LLC	)	
	)	
and	)	**Docket No. 12.28-111747A**
	)	**WC Appeal - Insurance**
NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.	)	
	)	
and	)	
	)	
THE CINCINNATI INSURANCE COMPANY	)	

FINAL ORDER

This matter was heard on October 17, 2011, before the Honorable Lynn England, Administrative Judge, assigned by the Secretary of State, with Marie Murphy, Assistant Commissioner for Policy of the Tennessee Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. Chlora Lindley-Myers was subsequently appointed the Commissioner's Designee and, as the Commissioner's Designee, Ms. Lindley-Myers makes the final determination as to the Findings of Fact and Conclusions of Law in this matter. Pro Charging Systems, LLC ("PRO Charging") was represented at the hearing by Attorney Daniel P. Smith. Cincinnati Insurance Company ("Cincinnati") was represented by Attorney Jonathan West. The National Council for Compensation Insurance, Inc. ("NCCI") was represented by Attorney W. Davidson Broemel of Burr & Foreman LLP.

JURISDICTION

The Commissioner of Commerce and Insurance (the "Commissioner") has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-309(b), which provides:

> Every insurer and rate service organization shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard on written request to review the manner in which the rating system has been applied in connection with the insurance afforded. If the insurer fails to grant or reject the request within thirty (30) days, the applicant may proceed in the same manner as if the application had been rejected. Any party affected by the action of the insurer on the request may, within thirty (30) days after written notice of the action, appeal to the commissioner who, after a hearing held upon not less than ten (10) days' written notice to the appellant and to the insurer, may affirm, modify, or reverse the action.

ISSUES

The subject of the hearing was whether NCCI correctly determined that the Classification Code assigned to PRO Charging production employees should be Classification Code 3643 (Electrical Power or Transmission Equipment Manufacturing or Classification rather than Code 3179 (Electrical Apparatus Manufacturing--NOC). After consideration of all testimony, exhibits and the entire record in this matter, it is determined that Class Code 3643 is the appropriate classification for PRO Charging employees engaged in the production of battery chargers, and that Class Code 3179 should be deleted. This decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. PRO Charging is a limited liability company engaged in the production of battery chargers in its facility located in La Vergne, Tennessee.

2. The National Council on Compensation Insurance, Inc. ("NCCI") is a rate service organization as defined in Tenn. Code Ann. § 56-5-302(1) and Tenn. Comp. R. & Regs. Chapter 0780-1-82-.04(10) and is licensed under Tenn. Code Ann. § 56-5-310. NCCI collects workers' compensation data for the insurance industry, makes inspection reports, and files classifications and rules for workers' compensation.

3. Cincinnati is an insurance company that holds a certificate of authority issued by the Commissioner to sell workers' compensation insurance to employers in Tennessee.

4. Cincinnati issued a Workers' Compensation and Employer Liability Insurance Policy No. WC210354902 for the policy period beginning June 1, 2009 and, at all times relevant, provided workers' compensation and employer liability insurance coverage for PRO Charging employees.

5. On January 5, 2010, NCCI performed an inspection of the PRO Charging operations and issued an Inspection and Classification Report (the "Inspection Report").

6. The Inspection Report determined that the class code assigned to PRO Charging employees engaged in the production of battery charges should be changed from Code 3179 (Electrical Apparatus Manufacturing--NOC) to Code 3643 (Electric Power or Transmission Equipment Manufacturing).

7. The *Basic Manual* defines Code 3643 to include "the manufacturing or repair of motors, generators, converters, transformers, switchboards, circuit breakers, switches, or switchboard apparatus or incidental equipment."

8. Code 3643 is defined in the *Scopes Manual* in pertinent part as follows:

> Code 3643 – Electric Power or Transmission Equipment Manufacturing
>
> Includes the manufacturing or repair of motors, generators, converters, transformers, switchboards, circuit breakers, switches or switchboard apparatus or incidental equipment.
>
> SCOPE: Code 3643 contemplates insureds that manufacture equipment described above. Additionally, Code 3643 includes repair and service operations on this type of equipment when performed in an insured's own shop. Code 3643 does not contemplate any installation or repair of the described equipment by an insured on the premises of the insured's customers. Refer to Code 3724—Electrical Apparatus Installation or Repair for this exposure.

Code 3643 is also applicable to insureds that manufacture the following products: induction furnaces when all electrical parts are also manufactured and assembled into the furnace; coil windings for industrial transformers or generators; battery chargers; and electric meter boxes, meter mountings and sockets.

It should be noted that Code 3643 is primarily intended for the manufacture of products that create, monitor or control electricity as opposed to devices that just use electricity to function. Refer to the appropriate electrical or electronic goods manufacturing classifications for insureds that manufacture products which operate on electricity but do not generate, monitor or control electricity.

9. Code 3179 is defined in the *Scopes Manual* in pertinent part as follows:

Code 3179 – Electrical Apparatus Manufacturing NOC

Includes electrical fixtures or appliances. Codes 3179 and 3643—Electric Power or Transmission Equipment Mfg. shall not be assigned to the same risk unless the operations described by these classifications are conducted as separate and distinct businesses.

SCOPE: Code 3179, an NOC classification, is applied to insureds that manufacture electrical apparatus, hardware or wiring devices that are not otherwise classified in the *Basic Manual*. Operations such as machining, drilling, tapping, grinding, threading, stamping, finishing, assembling, inspection, packing and shipping are contemplated by this classification.

While the term "electrical apparatus" implies a broad spectrum of devices powered by electricity, it must be remembered that this is an NOC classification and the manufacture of apparatus contemplated by this classification is of the nature of those items described below.

Code 3179 contemplates the manufacture of electrical apparatus such as electrical cable connectors, conductors, snap-in fittings, cable straps, cable supports, bushings, wall switches, couplings, nipples, fixture extensions and clamps. This classification also includes the manufacture of fractional horse power motors, flashlights, fire alarm sirens, smoke alarms, thermostats, grocery check-out laser scanners, and electrical appliances such as microwave ovens, toasters, irons, percolators, electric shavers, waffle irons, electric grills, hot plates, fans, humidifiers and vacuum cleaners.

* * * *

Code 3179 is a "not otherwise classified" (NOC) classification. This means that Code 3179 shall apply to an insured's operation(s) only when

no other classification more specifically describes the insured's operation(s).

* * * *

10. In response to the Inspection Report, the President and Chief Executive Officer of PRO Charging, Timothy J. Knox, sent a letter dated July 12, 2010 to Joanne Bonura, NCCI's Classification Quality Assurance Specialist, disputing the classification change, stating that PRO Charging is "not a complex manufacturing facility" and that its production of battery chargers involves only air-powered tools and other small tools, such as screwdrivers.

11. Mr. Knox requested review by the NCCI's Tennessee Internal Review Panel on August 6, 2010.

12. A hearing of the Internal Review Panel was conducted by teleconference on February 16, 2011. PRO Charging contended that it produced small, hand-held battery chargers which do not monitor, create or control electricity, whereas Code 3643 was intended for industrial size chargers in the range of 250 to 1,000 amperage involving the use of heavy machinery such as lathes, grinders, etc., which reflects a much higher exposure to injury for employees than what is encountered by employees at PRO Charging.

13. John Boylan, the Field Audit Manager of Cincinnati, advised the Internal Review Panel that Cincinnati believed that the final product of PRO Charging is consistent with assignment of Code 3179.

14. The Internal Review Panel issued a Notice of Decision on February 28, 2011 which determined that the proper classification for PRO Charging was Code 3643. The Panel determined that Code 3643 was intended to be applicable to the manufacture of all types of battery chargers, regardless of the size produced by the employer, and to products that create, monitor or control electricity as opposed to devices that just use electricity to function.

15. PRO Charging timely filed an appeal with the Department of Commerce and Insurance on March 10, 2011.

16. Mr. Knox testified that Code 3179 had been assigned to PRO Charging for at least twenty (20) years, during which time there had been no change in the company's production process.

17. Ron Darna, NCCI Rules and Classification Manager, testified on behalf of NCCI that Code 3179 is a classification of "last resort," applicable only when there is not a classification which describes "the risk at hand." On cross-examination, Mr. Darna acknowledged that the term "battery charger" does not appear in the classification description of either Code 3179 or Code 3643 of the *Basic Manual,* although the term is used in the second and third paragraphs of the classification description of Code 3643 in the *Scopes Manual.*

18. Nicholas Recker, a field auditor employed by Cincinnati Insurance Companies, testified on behalf of Cincinnati that he had been involved in the final audit of PRO Charging's workers' compensation and general liability insurance policy in 2009, 2010 and 2011, that he believed that Code 3179 had been correctly assigned to PRO Charging and had not, therefore, proposed a change in classification.

19. The words "battery charger" do not appear in the *Basic Manual* for either Code 3179 or 3643, but the *Scopes Manual* for Class Code 3643 does refer to "battery charger" and provides in pertinent part as follows:

> Code 3643 is also applicable to insureds that manufacture the following products: induction furnaces when all electrical parts are manufactured and assembled into the furnace; coil windings for industrial transformers or generators; battery chargers; and electric meter boxes, meter mountings and sockets.
>
> It also should be noted that 3643 is primarily intended for the manufacture of products that create, monitor or control electricity as opposed to devices that use electricity to function.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. & Regs. 1360-4-1-.02(7), the Petitioner, PRO Charging Systems, LLC, bears the burden of proof in proving by a preponderance of the evidence that the facts alleged in the Petition are true and that the issues raised therein should be resolved in its favor.

2. Tenn. Code Ann. § 56-5-320 requires each insurer doing business in Tennessee to be a member of the designated rate service organization and to adhere to a uniform classification system filed by the rate service organization and approved by the Commissioner.

3. The National Council on Compensation Insurance ("NCCI") is the designated rate service organization for the State of Tennessee pursuant to Tenn. Code Ann. § 56-5-320.

4. Workers' compensation classification codes are determined in accordance with the *Basic Manual for Workers' Compensation Liability Insurance, 2001 Edition* ("*Basic Manual*") and *Scopes® of Manual Classifications* ("*Scopes Manual*") published by NCCI. The *Basic Manual*, which has been filed and approved by the Commissioner, describes the workers' compensation classifications and the rules used to apply those classifications to employers. The *Scopes Manual*, which has not been filed with or approved by the Commissioner, describes and explains the classifications contained in the *Basic Manual.*

5. Rule 1-D of the *Basic Manual* provides in pertinent part:

> The purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer within a state. Subject to certain exceptions described in this rule, each classification includes all the various types of labor found in a business.
>
> It is the business that is classified, not the individual employments, occupations or operations within the business.
>
> Certain exceptions apply and are noted below.
>
> * * * *
>
> 2. Businesses Not Described by a Classification

> If no basic classification clearly describes the business, the classification that most closely describes the business must be assigned. For a business not described by any classification, show the wording that describes the business in Item 4 of the Information Page of the policy. With this wording, show the code number of the classification that most closely describes the business. All the rules pertaining to the assigned basic classification apply to the operation.

* * * *

6. Rule 1-C-2-g of the *Basic Manual* provides: "NOC means Not Otherwise Classified. If the classification wording uses the term NOC, that classification applies only if no other classification more specifically describes the insured's business."

7. The Introduction to the *Scopes Manual* provides: "The Scopes Manual is a guide for understanding and assigning workers compensation classifications. . . . In the unlikely event that there is a conflict between material contained in the *Basic Manual* and the *Scopes Manual*, the information contained in the *Basic Manual* takes precedence."

8. PRO Charging has failed to show by a preponderance of the evidence that the NCCI Inspection Report, which determined that Code 3643 should be assigned to PRO Charging employees involved in producing battery charges, is in error. PRO Charging contends that there is conflict between the classification wording contained in the *Scopes Manual*, which lists battery chargers among the end products to which the classification applies, and the *Basic Manual,* which does not. It further contends that since the classification wording contained in the *Basic Manual* should be controlling in the event of a conflict between the *Basic Manual* and *Scopes Manual*, it would not be proper to assign Code 3643 based solely on the fact that the classification wording in the *Scopes Manual* lists battery chargers. The *Scopes Manual* cannot be viewed as conflicting with the *Basic Manual* with regard to a particular classification, however, simply because it adds to the list of end products specified

for, or the processes, materials, tools, and equipment. The difference between the manuals does not, standing alone, represent a conflict.

PRO Charging also contends that, since its production of battery chargers involves only the assembly of components purchased from third party suppliers, it is not engaged in "manufacturing" in the sense such term is used in the classification wording for Code 3643 in either the *Basic Manual* or *Scopes Manual.* The argument that the term "manufacturing" and "assembly" refer to distinctly different activities would have greater weight if, for example, the term "manufacturing" were not also used in the classification wording for Code 3179. The term "manufacturing" appears to refer to a wide range of processes related to the process of making a finished product, including machining, tapping, grinding, etc., as well as assembling.

9. Tenn. Comp. R. & Regs. 0780-1-82-10(2) (g) provides that "[o]rders issued under . . . this Rule shall assign the costs of the appeal, in the commissioner's discretion, to the non-prevailing party."

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED**:

1. The NCCI Inspection and Classification Report correctly determined that Code 3643 is the correct classification with regard to PRO Charging employees engaged in the manufacture of battery chargers.

2. The use of Code 3179 is deleted for the policy period June 6, 2009 and forward.

This Final Order is entered and effective this the 30th day of March, 2012.

3. Costs of this matter shall are taxed against the Petitioner, PRO Charging Systems, LLC.

Chlora Lindley-Myers
Assistant Commissioner for Policy

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 30, day of March, 2012.

Thomas G. Stovall, Director
Administrative Procedures Division

NOTICE OF APPEAL PROCEDURES

Review of Final Order

This Final Order is issued pursuant to Tenn. Comp. R. & Regs. 0780-1-82-.10. Any party who is aggrieved by this Final Order is entitled to judicial review pursuant to Tenn. Code Ann. § 4-5-322. See Tenn. Comp. R. & Regs. 0780-01-82-.11.

Tenn. Code Ann. § 4-5-322 provides in relevant part:

(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review.

* * * * *

(b)(l)(A) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon.

*****

(2) In a case in which a petition for judicial review is submitted within the sixty-day period but is filed with an inappropriate court, the case shall be transferred to the appropriate court. The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition for reconsideration. Copies of the petition shall be served upon the agency and all parties of record, including the attorney general and reporter, in accordance with the provisions of the Tennessee Rules of Civil Procedure pertaining to service of process.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing that shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the court, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied. The reviewing court shall not consider a stay unless notice has been given to the attorney general and reporter; nor shall the reviewing court consider a stay unless the petitioner has previously sought a stay from the agency or demonstrates that an agency ruling on a stay application cannot be obtained within a reasonable time.

CERTIFICATE OF SERVICE

A copy of the within and foregoing document has been served upon,

W. Davidson Broemel, Esq.
Burr & Forman LLP
700 Two American Center
3102 West End Avenue
Nashville, TN 37201

Daniel Paul Smith, Esq.
DPS Legal Counsel
1616 Westgate Circle
Brentwood, TN 37027

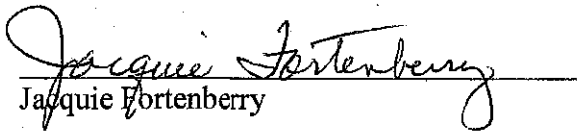
Jonathan Martin West, Esq.
424 Church Street, Suite 2500
P. O. Box 198615
Nashville, TN 37219

Nicholas Recker
Cincinnati Insurance Company
P. O. Box 682041
Franklin, TN 37068

Michael Shinnick
Workers' Compensation Manager
Tennessee Department of Commerce and Insurance
500 James Robertson Parkway, Fourth Floor
Nashville, TN 37243

By depositing same into the United States Mail enclosed in an envelope with adequate postage affixed thereon.

This the 30th day of March, 2012.



Jacquie Fortenberry