IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
CHANCERY COURT, PART TWO

PRO CHARGING SYSTEMS, LLC Petitioner vs. STATE OF TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE, NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., and THE CINCINNATI INSURANCE COMPANY, Respondents.	)	FO-9 No. 12-0641-II II

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MEMORANDUM AND ORDER

Pursuant to Tenn. Code Ann. §4-5-322 *et seq.*, Petitioner, Pro Charging Systems, LLC ("Pro Charging"), seeks judicial review of a Final Order by the Defendant, the Tennessee Department of Commerce and Insurance ("Department"), which upheld a rate change for purposes of workers' compensation insurance coverage from Code 3179 to Code 3643. The assigned classification Code is intended to best describe the business of Pro Charging within the State of Tennessee.

The Department asserts that there are no valid grounds for reversal or modification of the Final Order upholding the classification of Code 3643 to Pro Charging's production department. The Defendant, National Council on Compensation Insurance, Inc. ("NCCI"), joins the Department in its defense of the Final Order and submits that the Final Order should be upheld. The Defendant, the Cincinnati Insurance Company ("Cincinnati Insurance"), is aligned with Pro Charging and is a nominal defendant, having issued the workers' compensation policies for Pro Charging. Cincinnati Insurance orally took the position that Code 3179 was the proper code classification for Pro Charging's business.

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BACKGROUND

Pro Charging, a manufacturer of battery chargers, is an employer insured under workers' compensation policies issued by Cincinnati Insurance. For many years, Cincinnati Insurance assigned the class code 3179 (Electrical Apparatus Mfg. NOC[1]) to Pro Charging's production department.

NCCI is the sole authorized service organization in Tennessee for workers' compensation insurance. It is licensed by the State of Tennessee and collects workers compensation data, and files rates, loss costs, rules and procedures and classifications. NCCI also prepares and files a Basic Manual with the Commissioner for the Department of Commerce and Insurance ("Commissioner") for approval. The Basic Manual contains a premium algorithm by which an employer's estimated annual workers' compensation insurance premium is calculated.

On January 10, 2010, NCCI auditors inspected Pro Charging's workplace and retroactively changed its assigned governing code classification for 2009 from Code 3179 to Code 3643.

Pro Charging disputed the code change. On February 16, 2011, the NCCI Tennessee Internal Review Panel ("NCCI Review Panel") heard Pro Charging's challenge to the classification code change. On February 28, 2011, the NCCI Review Panel held that the classification Code 3643 for Pro Charging was correctly applied and issued its decision. In making its decision, the NCCI Review Panel used the NCCI Scopes Manual ("Scopes Manual") to explain the scope of Code 3643 in the NCCI Basic Manual ("Basic Manual"). The NCCI

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[1]. NOC is an acronym for "not otherwise classified."

Review Panel determined that (a) the description of "battery chargers" as included in Code 3643 was very specific to the manufacturing of battery chargers, but the description did not state the size or type of the final product; (2) Code 3643 included all types of battery charger manufacturers, including manufacturing and assembly; (3) a battery charger is designed to monitor and control electricity, a purpose of the classification set forth in the *NCCI Scopes Manual* and (4) the chargers manufactured by Pro Charging monitored and generated the proper charge for batteries.

Pro Charger appealed to the Commissioner, pursuant to Tenn. Code Ann. § 56-5-309(b).[2] The Commissioner's designee[3] heard the appeal on October 17, 2011. Pro Charging contended that the NCCI auditor erred by changing the code from 3179 to code 3643. NCCI, through its counsel, defended its decision to assign Code 3643. Cincinnati Insurance did not oppose Pro Charging's position, offering testimony that Code 3179 was the correct classification.

The Final Order, dated March 30, 2012, held that the classification code 3643 was correctly applied to Pro Charging's business of manufacturing battery chargers and further found that the use of Code 3179 was deleted for the policy period June 6, 2009 and forward. On April

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2. Tenn. Code Ann. § 56-5-309(b) states as follows:
Aggrieved Persons. 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.

Tenn. Code Ann. § 56-5-309.

3. Administrative Law Judge ("ALJ") Lynn England was assigned by the Secretary of State to preside at the hearing, but did not participate in the decision on the merits. The Commissioner's initial designee, Marie Murphy, was replaced by Chlora Lindley-Myers, who made the decision on the merits. The Department was not a litigant to the proceedings. NCCI was represented by counsel at the hearing.

30, 2012, Pro Charging timely filed its Petition for Review in Davidson County Chancery Court. Oral arguments were heard September 26, 2012.

STANDARD OF REVIEW

The Court's review of this matter is governed by the Uniform Administrative Procedures Act. This Court is not allowed by law to consider this matter *de novo* but must limit the review to the record created by the agency below. *Metropolitan Government v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977). Pursuant to Tenn. Code Ann. § 4-5-322, the Court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(5) Unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

In determining whether there is substantial and material evidence, the standard "requires something less than a preponderance of the evidence, but more than a scintilla or glimmer." *Wayne County v. Tennessee Solid Waste Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988) (citations omitted). Furthermore, "[s]ubstantial evidence is not limited to direct evidence but may also include circumstantial evidence or the inferences reasonably drawn from direct evidence." *Id.* (citations omitted). In short, "[s]ubstantial and material evidence is such relevant

evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Southern Ry. Co. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984) (citations omitted).

Additionally, the substantial and material evidence standard is related to the arbitrary or capricious standard, i.e., "[a]gency decisions not supported by substantial and material evidence are arbitrary and capricious." *Jackson Mobilphone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993). "However, agency decisions with adequate evidentiary support may still be arbitrary and capricious if caused by a clear error in judgment." *Id.* To that end, the reviewing court should not apply the arbitrary and capricious standard of review "mechanically":

> In its broadest sense, the standard requires the court to determine whether the administrative agency has made a clear error in judgment. An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.

Id. at 110 - 111(citations omitted).

Further, Tenn. Code Ann. § 4–5–322(i) provides that no agency decision "in a contested case shall be reversed, remanded, or modified ... unless for errors which affect the merits of such decision." *Crawford v. Dep't of Fin. & Admin.*, M2011-01467-COA-R3-CV, 2012 WL 219327, at *5 (Tenn. Ct. App. Jan. 24, 2012)(internal citations omitted).

ISSUES

The determinative issue is whether the Commissioner is legally prevented from using the unfiled NCCI Scopes Manual when assigning a code to Pro Charging's business operations.

Pro Charging contends that the Basic Manual is the legal standard to use when assigning the proper basic classification to an employer's business and that as a matter of law, the Basic

Manual requires that classification code 3179 be assigned to its production department. In addition, Pro Charging contends that the Scopes Manual is legally irrelevant and non-authoritative, and that the Commissioner's assignment of Code 3643 from the Scopes Manual was improper as a matter of law.

NCCI submits that the Scopes Manual describes and explains the classifications contained in the Basic Manual, that the Scopes Manual was properly admitted into evidence, and that the manual is thus legally relevant. Further, NCCI alleges that the Commissioner's use of the Scopes Manual was proper to determine the proper classification code. The Department joins NCCI in its position that the Commissioner assigned the correct code and that the Final Order should be upheld.

ANALYSIS

The Commissioner found that the proper classification code was 3643. Pro Charging argues that the Commissioner exceeded her authority by using the unapproved Scopes Manual because the Basic Manual, filed with the Commissioner and approved by the Commissioner pursuant to statute, clearly states that (1) its purpose is to assign the one basic classification that best describes the business of the employer and (2) in the absence of a specific applicable code, the Basic Manual requires the application of classification code 3179 (NOC) because no code specifically describes Pro Charging's business.

There is no dispute that the nature of Pro Charging's business is the manufacture and assembly of battery chargers. Pro Charging states that the function of the battery charger is to restore specific gravity in a battery or a battery pack. The printed circuit board of the battery charger contains a proprietary algorithm, which enables it to respond to the demands of the battery or battery pack to which it is attached.

For years, Cincinnati Insurance assigned Classification Code 3179 to Pro Charging's business for purposes of workers' compensation insurance coverage. Thus, in January, 2010, when NCCI audited Pro Charging's operations and changed the Classification Code from 3179 (NOC) to Code 3643 (*Electric Power or Transmission Equipment, Mfg.*), Pro Charging protested because the NCCI auditor used the Scopes Manual to assign the code change, resulting in a retroactive charge of additional premiums.

NCCI's Basic Manual provides the operative rules for classification assignment. Rule 1.C.1. in the Basic Manual explains its use of a caption and a note as follows:

> The caption is the heading that precedes the classification itself and is part of the classification wording. The note is the phrase that follows the classification and is part of the classification wording. The classification wording, including captions and notes, controls, restricts or explains the classification usage.

The Basic Manual also contains three other relevant rules for the assignment of Codes. Rule 1.C.2.g defines NOC as "Not Otherwise Classified." According to that Rule, "if the classification wording uses the term NOC, that classification applies only if no other classification more specifically describes the insured's business." Rule 1.D.1 declares that the purpose of the classification procedure is "to assign the one basic classification that best describes the business of the employer within the state." And Rule 1.D.2 provides that "if no basic classification clearly describes the business, the classification that most closely describes the business must be assigned."

Pro Charging argues that Tenn. Code Ann. §56-5-320, which provides a uniform classification system to be used by Tennessee insurers to classify the jobs of their insureds, establishes the legal standard for the assignment of the proper basic classification code to an employer's business. Tenn. Code Ann. §56-5-320 states, in pertinent part, as follows:

(a) The commissioner **may** designate a rate service organization to assist in gathering, compiling and reporting relevant workers' compensation insurance statistical information. **If** the commissioner makes the designation, every workers' compensation insurer shall record and report its workers' compensation insurance experience to the designated rate service organization as set forth in the uniform statistical plan approved by the commissioner and if requested shall file a copy of the report with the commissioner.

(b) Each workers' compensation insurer shall be a member of the workers' compensation insurance rate service organization. Each workers' compensation insurer shall adhere to the policy forms and rating rules filed by the designated rate service organization.

(c) Every workers' compensation insurer shall adhere to a uniform classification system and uniform experience and retrospective rating plans that have been filed with the commissioner by the designated rate service organization and approved by the commissioner.

(d) **Subject to the approval of the commissioner**, the rate service organization shall develop and file rules reasonably related to the recording and reporting of data pursuant to the uniform statistical plan, uniform experience rating plan and the uniform classification system.

(e) For workers' compensation insurance provided in the voluntary market, no schedule rating plan shall limit its application to any risk based on premium size or eligibility for experience rating; provided, that the application for the plan to any individual risk shall not result in the premium for the risk being less than the classification minimum premium established for workers' compensation insurance.

Tenn. Code Ann. § 56-5-320 (emphasis added).

The parties agreed that NCCI filed with the Department a descriptive document called NCCI's Basic Manual for Workers Compensation and Employers Liability Insurance ("Basic Manual") which divides about 580 occupations and operations in Tennessee into separate class codes. The parties stipulated that the Commissioner could take judicial notice of the Basic Manual.

The NCCI also publishes a second manual, the Scopes Manual ("Scopes Manual"), which is not filed with the Department, but is used as a guide to interpret the Basic Manual. The parties stipulated that the Commissioner could take judicial notice of the unfiled Scopes Manual.

Pro Charging and its insurer, Cincinnati Insurance, state that neither the Caption nor the Note for Code 3643 in the Basic Manual refers to the manufacturing of battery chargers. Instead, the Caption reads "Electric Power or Transmission Equipment Manufacturing" and the Note that follows the caption simply states that it includes the manufacturing or repair of motors, generators, convertors, transformers, switchboards, circuit breakers, switches or switchboard apparatus or incidental equipment.

According to Pro Charging, the Commissioner had no authority to deviate from the Basic Manual in assigning classification codes. It also contends that Classification Code 3643 clearly did not include manufacturers of battery charges. Accordingly, reasons Pro Charging, the Commissioner was required to assign the catch-all Classification Code 3179, NOC (Not Otherwise Classified).

Pro Charging's position is based upon a misreading of the controlling statute. While each insurer is required to adhere to the rating plans filed with and approved by the Commissioner, the statute does not require the Commissioner to adhere to the rating plans. The statute gives the Commissioner the discretion to designate a rate service organization to assist in the gathering of statistical information relevant to workers' compensation insurance. Only if the Commissioner exercises that discretion does an insurer have a duty to comply with those rate plans and to make the requisite filings. Further, the rate service organization develops and file rules reasonably related to the recording and reporting of data pursuant to the uniform statistical plan, uniform experience rating plan and the uniform classification system, all of which are subject to the

approval of the Commissioner. The statute does not bind the Commissioner to an unamplified interpretation of the rules or rating system provided by the rate service organization.

Further, the Commissioner has discretion to determine if reasonable rules and plans should be promulgated for the interchange of data necessary for the application of rating plans. Tenn. Code Ann § 56-5-321(a). The statute authorizes cooperation among advisory organizations, or among advisory organizations and insurers in rate making or in other matters within the scope of the chapter, although it gives the Commissioner the power to review the cooperative activities and practices. Tenn. Code Ann. §56-5-321(c).

Given the broad discretion granted to the Commissioner to designate the rate service organization, to approve the rules related to the recording and reporting of data, and to request other data that the Commissioner deems necessary in considering requests for rate adjustments, Pro Charging's argument that the Commissioner acted arbitrary or capriciously is without merit.

The Scopes Manual is a non-authoritative document that assists in interpreting the Basic Manual's 580 code captions. These captions are intended to provide a substantive meaning, but the codes constitute only a fraction of the five thousand to six thousand actual job classifications that might apply to Tennessee businesses. The Basic Manual does not purport to be exhaustive, and clearly states that Code 3179 NOC is to be applied only when no other classification more specifically describes the insured's operations. However, before resorting to this "catch-all" category, insurers can look to the Scopes Manual for an illumination of the existing classifications. The Scopes Manual defines Code 3643, 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, Coded 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.

Pro Charging is correct that the words "battery charger" do not appear in the Basic Manual in either Code 3643 or Code 3179; however, it is apparent from the above explanation found in the Scopes Manual that manufacturers who make products that create, monitor or control electricity are properly assigned Code 3643. The explanation does not conflict with the language in the Basic Manual but instead, appropriately explains and assists in determining the proper classification for a manufacturer who makes a product that generates, monitors or control electricity, such as a battery charger.

Upon consideration of the transcript of the proceedings before the Commissioner's designee, all of the exhibits in the technical record, the applicable statutes, rule and manuals, and the arguments raised by each party, the Court finds that the Commissioner had the authority to use the Scopes Manual to assign Code 3643 to Pro Charging's manufacture and assembly of battery chargers. Further, the Commissioner's action was based upon substantial and material

evidence in the record. The Court finds that Code 3643 is the proper classification code for Pro Charging's manufacturing of battery chargers.

CONCLUSION

For the foregoing reasons, the Final Order is upheld and Pro Charging's petition is respectfully denied. Costs of this cause are assessed against Pro Charging.

IT IS SO ORDERED.

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RULE 58 CERTIFICATION

A copy of this order has been served by U.S. Mail upon all parties or their counsel named above.

TL
Deputy Clerk and Master
Chancery Court

12-6-12
Date