



## FINDINGS OF FACT

1. Krauss Craft, Inc. is a manufacturer of playground equipment as well as items such as benches, signs and playground borders. The company is located in Grants Pass. Employer manufactures both metal and plastic components. The company has 21 "metal workers" with 12 of them working in the welding shop, three in the bending shop, and six in the cleaning shop. There are 17 additional workers in the powder coating shop, six employees in the hardware department, and 13 in the roto-mold plastic department. (Ex. 4 at 2).

2. NCCI, a national organization, and the local rating entity, ORAC, are charged with the task of determining the correct classification code or codes for businesses, to correctly determine the risks for workers' compensation premium purposes. It is the business that is classified, as opposed to each individual job performed in the business. The main classification code, called the governing code, will be assigned to the various types of labor found in the business, with certain exceptions, even though there might be other codes that could be assigned to the other types of labor. The governing code is determined by the part of the business with the greatest amount of payroll. (Ex. 1; Test. of Hughes).

3. NCCI inspected employer's manufacturing operation to determine what the governing classification code should be. It determined that code 3040 was the appropriate code to govern the manufacturing of metal playground equipment because 21 of the workers were involved in welding and metal working, making it the largest part of the business. (Ex. 1). Employer objected to this conclusion, arguing that there were more powder coaters than there were welders. Employer argued that it should be able to use other less expensive codes for the various metal processes, and should be able to have a separate code—an exception—for the Hardware Department, the Deck and Powder Coating Department, and the Plastic Department. (Ex. 4).

4. ORAC applied Basic Manual Rule 1-D-3 to determine whether those operations were separable from the governing code. Under that rule, separability is determined by whether the additional operation: 1) is able to exist as a separate business if the insured's principal business in the state ceased to exist; 2) is located in a separate building, floor or room from the principal business, with sufficient protection for employees from the hazards of the other parts of the business; and 3) has separate payroll records. (Ex. 3 at 2). The first criterion does not address whether the additional operation *could* be turned into a separate business in the future; it addresses whether, at the time of inspection, it could presently operate as a separate business if the principal business ceased to exist. (Test. of Hughes).

5. Employer sought review of the NCCI decision before ORAC, asking for the return of additional classification codes and seeking several different codes for the Hardware Department, the Deck and Powder-Coating Department, and the Plastic Department. (Ex. 4). ORAC determined:

- The governing classification of a business is based on the operations with the greatest payroll, generally reflected by the operations with the greatest number of employees. The standard exceptions classification, Code 8810, is not considered when determining the governing classification.
- Based on employee head count, the committee affirmed that Code 3040 is the governing classification.
- The committee determined that the Deck and Powder Coating operations, and the Hardware Departments are supporting operations of the business and do not qualify as a secondary business.
- Members discussed whether the plastic component manufacturing classified by NCCI to Code 4484, is in fact eligible for a secondary classification in accordance with Rule 3-D. After review and discussion of this rule, it was agreed that a secondary classification for this specific operation is appropriate because it is physically separated, the insured indicated that they may start in the future performing this work for others, and the degree/type of plastic manufacturing performed by this department is not contemplated by Code 3040.

(Ex. 3 at 3). Based upon these deliberations, ORAC decided to allow code 4484 for the plastic operation but denied separate codes for the Hardware and Deck and Powder Coat operations. (Id.).

### CONCLUSIONS OF LAW

The Case Summary and Decision dated May 8, 2009 is correct:

- a. In its conclusion that classification code 3040 is the appropriate governing code for employer's operation; and
- b. In its conclusion that the Deck and Powder Coating Department is not entitled to its own code, separate from the governing code.

### OPINION

Employer has contested the ORAC decision of May 8, 2009, arguing that it should be allowed to use different classification codes for the Deck and Powder Coat operations, and that a code other than 3040 should be the governing code. Employer has the burden of proof to establish that the ORAC decision is incorrect. ORS 183.450(2); *Salem Decorating v. NCCI*, 116 Or App 166 (1992) *rev den* 315 Or 643 (1993).

**The governing code.** As employer has indicated in their written materials, it has 21 "metal workers" with 12 of them working in the welding shop, three in the bending shop, and six in the cleaning shop. There are 17 in the powder coating shop, six employees in the hardware department, and 13 in the roto-mold plastic department. (Ex. 4 at 2). Under employer's interpretation of the governing code concept, powder coating

(3066) should be the governing code instead of the welding and steel-working code, (3040), because there are 17 workers in powder coating and only twelve in welding.

ORAC argues that employer is interpreting the 3040 code too narrowly when it counts only the welders, because code 3040 also applies to the work performed in the bending department and the cleaning department. When all of those positions are added together, there are 21 employees compared to 17 in powder coating. I agree with ORAC; because the additional duties are part of the 3040 class code, 3040 is the governing classification.

**The deck and powder-coating department.** Employer has presented evidence attempting to show that the powder coating department meets the criteria of Rule 1-D-3, and it argues that a separate classification code is appropriate. Noting that the plastic department received its own code, employer argues that powder coating, which involves putting a plastic-like covering on metal, should also receive a separate code.

Once again, ORAC disagrees. Although many of the separability criteria have been met by the employer, there are two reasons why ORAC (and NCCI) disagree with employer's position that it is entitled to a separate code for Decking and Powder Coating. First, powder coating still involves working with metal. Because it is still metal work it is similar to all of the other complementary metal working tasks subsumed into the 3040 code. The plastic department was given an exception because the workers were working in plastic, not metal, and so the operation was separable. Not so with powder coating.

Second, ORAC concluded that employer failed to show that powder coating was a separate business that would survive if the rest of the company ceased to exist. Although ORAC's explanation of this criterion was somewhat confusing at times—it was unclear whether the ability to exist as a separate business was prospective or referred to the additional operation at the point and time of the inspection—Hughes' testimony clarified that the focus was on now, not some point in the future. At the current time, employer's powder coating operation is not self-sustaining.

Therefore, while it is theoretically quite possible that employer could create a second business out of the powder-coating operation, it was unable to continue as a business at the time NCCI looked at employer's operation. Employer failed its burden of proof in the case.

**PROPOSED ORDER**

I propose that the Division issue the following final order:

That the ORAC Case Summary & Decision dated May 8, 2009 be AFFIRMED.

DATED this 17<sup>th</sup> day of February, 2010.



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Rick Barber, Administrative Law Judge  
Office of Administrative Hearings

**NOTICE OF OPPORTUNITY FOR ADMINISTRATIVE REVIEW**

**NOTICE:** Pursuant to ORS 183.460, the parties are entitled to file written exceptions to this proposed order and to present written argument concerning those exceptions to the Director. Written exceptions must be received by the Department of Consumer and Business Services within 30 days following the date of service of this proposed order. Mail exceptions to:

Mitchel D. Curzon  
Chief Enforcement Officer  
Oregon Insurance Division  
PO Box 14480  
Salem, OR 97309-0405

CERTIFICATE OF SERVICE

On 17th day of February 2010, I mailed the foregoing Proposed Order in Reference No. 0908001.

BY FIRST CLASS MAIL:

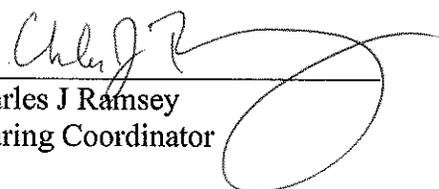
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VIA ELECTRONIC MAIL:

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Charles J Ramsey  
Hearing Coordinator