STATE OF OREGON

DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

DIVISION OF FINANCIAL REGULATION

IN THE MATTER OF:	)	FINAL ORDER
Columbia Steel Casting, Inc.	)	OAH No. 1411003
	)	

Procedural History

On November 3, 2014, the Oregon Workers' Compensation Rating System and Advisory Committee (ORAC), on behalf of the National Council on Compensation Insurance (NCCI), denied Columbia Steel Casting, Inc.'s (CSC) request for assignment of three separate classification codes, rather than a single classification code. On November 13, 2014, CSC filed a timely request for hearing with the Department of Consumer and Business Services, Insurance Division (DCBS). CSC appealed assignment of a single classification code (3082 – foundry) by its insurer, SAIF. SAIF did not participate in the proceedings before ORAC. In addition, SAIF has not sought to intervene as a party, limited or otherwise, in this matter.

On November 13, 2014, DCBS referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. Senior ALJ Allen convened a prehearing conference (PHC) on January 16, 2015 and subsequently rescheduled the PHC for March 10, 2015. At the rescheduled prehearing conference, the parties agreed this matter was appropriate for resolution through summary determination. At the request of the parties, the ALJ did not schedule this matter for hearing.

On June 16, 21015, CSC filed a motion seeking summary determination in its favor. On July 6, 2015, NCCI filed a responsive brief. CSC filed a reply on July 15, 2015. On September 1, 2015, the parties presented oral argument on the motion and Senior ALJ Allen closed the record on September 1, 2015.

On October 5, 2015 Senior ALJ Allen submitted a "Ruling on Appellant's Motion For Summary Determination and Proposed Order" precluding NCCI from applying a single code 3082 to the machining and pattern making operations of CSC. NCCI submitted exceptions to the Proposed Order on November 13, 2015. CSC submitted a response on November 16, 2015.

By Memorandum dated July 20, 2016, the Director remanded the exceptions to OAH to consider the written exceptions and, if necessary issue a revised proposed order. On August 23, 2016, NCCI filed a supplemental memorandum in support of written exceptions to the proposed order. CSC filed a reply on September 8, 2016.

Senior ALJ Joe Allen issued a "Responses on Exceptions" on September 7, 2017 affirming the Proposed Order issued October 5, 2015, allowing CSC's request for assignment of three separate classification codes, rather than a single classification code.

Findings of Fact, Conclusions of Law and Opinion

The Director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and reasoning of the Proposed Order and Responses on Exceptions as the findings of fact, conclusions of law, and reasoning of this final order.

Order

ORAC/NCCI is precluded from applying Code 3082 to Columbia Steel Casting, Inc.'s Pattern Making and Machine Shop operations under the Final Order of DCBS issued April 29, 1986.

Notice of Right to Judicial Review

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the date the party received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated January 26, 2018

TK Keen
Deputy Administrator, Division of Financial Regulation
Department of Consumer and Business Services

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION

IN THE MATTER OF:	) **RULING ON APPELLANT'S MOTION**
	) **FOR SUMMARY DETERMINATION**
COLUMBIA STEEL CASTING, INC.	) **AND PROPOSED ORDER**
	)
	) OAH Case No.: 1411003
	)

PROCEDURAL HISTORY

On November 3, 2014, the Oregon Workers' Compensation Rating System and Advisory Committee (ORAC), on behalf of the National Council on Compensation Insurance (NCCI), denied Columbia Steel Casting, Inc.'s (CSC or Appellant) request for assignment of three separate classification codes, rather than a single classification code. On November 13, 2014, CSC filed a timely request for hearing with the Department of Consumer and Business Services, Insurance Division (DCBS or Division).[1]

On November 13, 2014, DCBS referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to preside at hearing. Senior ALJ Allen convened a prehearing conference (PHC) on January 16, 2015. The purpose of the prehearing conference was to establish issues for hearing and set a schedule for prehearing procedures and the hearing. William Replogle, Attorney at Law, appeared on behalf of Appellant. Vickie Dorsey, Managing Attorney, appeared for NCCI. At the prehearing conference, the parties notified the ALJ of multiple conflicts of interest on both sides of this matter. The ALJ reset this matter for further PHC to allow time for the parties to resolve the conflicts and/or secure new counsel in this matter. On March 10, 2015, the ALJ convened an additional PHC.[2] Patrick C. Wylie, Attorney at Law, appeared on behalf of Appellant. Jay W. Beattie, Attorney at Law, appeared on behalf of NCCI. At the rescheduled prehearing conference, the parties agreed this matter was appropriate for resolution through summary determination. Senior ALJ Allen established a schedule for filing motions for summary determination, responsive, and reply briefs. At the request of the parties, the ALJ did not schedule this matter for hearing.

[1] CSC appealed assignment of a single classification code (3082- foundry) by its insurer, SAIF. SAIF did not participate in the proceedings before ORAC. In addition, SAIF has not sought to intervene as a party, limited or otherwise, in this matter.

[2] The parties were unable to come to terms regarding conflict waivers on either side. In addition, the parties experienced difficulties in securing new counsel familiar with the subject matter of this dispute. Consequently, the prehearing conference in this matter was reset three times (2/2/2015; 2/23/2015; and 3/10/2015).

On June 16, 2015, CSC filed the instant motion seeking summary determination in its favor. On July 6, 2015, NCCI filed a responsive brief. CSC filed a reply on July 15, 2015. On September 1, 2015, the parties presented oral argument on the motion in Tualatin, Oregon. Senior ALJ Allen closed the record on September 1, 2015 and took the matter under advisement.

ISSUES

1. Whether there are genuine issues as to any material facts and, if not, whether CSC is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.

2. Whether NCCI is precluded by prior final order of DCBS from determining Code 3082 applies to all operations of CSC previously allocated to three separate classifications.

DOCUMENTS CONSIDERED

CSC's Motion, Affidavits of Mary Cox with Exhibits A through L (Cox Exhibits), Steve Warren with Exhibits A through C (Warren Exhibits), and Patrick Wylie with Exhibits A through E (Wylie Exhibits), as well as NCCI's Response, and CSC's Reply with Affidavit of Wylie containing Exhibits F through H were considered by the ALJ in preparation of this ruling.

FINDINGS OF FACT

1. Sometime in or about 1983, CSC applied for a workers' compensation insurance policy with SAIF Corporation (SAIF or insurer). In or about May 1983, CSC applied to Oregon Council on Compensation Insurance (OCCI)[3] for review of the insurer's decision to apply a single classification code, 3082-Foundry, to the three distinct operational units. (Cox Ex. B.)

2. At the time of the 1983 dispute, CSC operated three distinct divisions; a foundry, a pattern making shop, and a machine shop. (Cox. Ex. F at 2.) In its request to OCCI, CSC requested review of SAIF's decision to apply classification code 3082 to the pattern making and machine shop operations. CSC asserted that SAIF should apply three separate codes, 3082-Foundry, 3632-Machine Shop, and 2790- Pattern Making, to its operations. (Cox. Ex. B.)

3. On May 17, 1983, OCCI issued a determination upholding the assignment of a classification code 3082 to all operations of CSC. (Cox Exs. B and F at 9.)

4. CSC appealed OCCI's determination to the Division and an administrative hearing was held on March 16, 1984 before Division Hearing Officer Richard McGavok. (Cox Ex. F at 1.) At the hearing, NCCI appeared on behalf of OCCI. (*Id*.) Subsequent to the evidentiary hearing, the parties submitted written closing arguments on October 31, 1984. (Cox Exs. E and F at 1.)

5. Hearing Officer McGavok issued a proposed order on March 25, 1986, concluding that "assignment of classification Code 3082 [Foundry] to the pattern [] making and machine shop divisions of [CSC] contravenes ORS 737.310(1)." (Ex. F at 11.) In the proposed

[3] OCCI is now identified by the acronym ORAC. It is unclear when the name change became effective.

order, Hearing Officer McGavok reversed the May 17, 1983 decision by OCCI and ordered OCCI/NCCI to reclassify CSC's pattern making machine shop divisions to classification codes 2790 and 3632 respectively. The proposed order instructed OCCI/NCCI to apply the reclassification retroactively to April 1, 1983. (Cox Ex. F at 11 and 17.)

6. The proposed order found that CSC operated as an integrated company with three distinct operational divisions: a foundry, a pattern making facility, and a machine shop. The proposed order also found that each division operated in separate buildings, performed exclusive and distinctive functions, and employed different personnel that did not intermingle in work operations. Further, each division maintained separate payroll. The employees of each division were represented by different labor unions, possessed skills distinct to his/her division, and utilized separate lunchrooms and locker room facilities. (Cox Ex. F at 2 through 5.)

7. On April 29, 1986, DCBS adopted the proposed order as it final order. (Cox. Ex. G.) NCCI did not appeal the final order of DCBS. (Stipulated.)

8. Between May 1986 and about April 2014, each of CSC's insurers has abided by the conclusions and final order of DCBS. (Cox Ex. I at 3; Cox Decl. at 3.)

9. Columbia Steel continues to operate with three distinct operating units housed in three different buildings, each with separate personnel. CSC's machine shop now markets itself under a separate dba, Columbia Engineering Works (CEW). CEW promotes its services to third-party customers. (Cox Decl. at 3 and 4.)

10. Between 1983 and 2014, the text of ORS 737.310(1) has remained unchanged. (Wylie Ex. E at 9.)

11. In 2014, CSC applied for worker compensation coverage from SAIF. SAIF determined the 1986 final order was no longer binding and assigned classification code 3082 to all CSC operations. (Cox Ex. K at 2.)

12. Classification codes 3082- Foundry, 3632-Machine Shop, and 2790- Pattern Making have remained essentially unchanged between 1983 and 2014. (Wylie Exs. B, C, and D; Cox Exs. D at 2 and 3.)

CONCLUSIONS OF LAW

1. No genuine issues of material fact exist to be determined at hearing and CSC is entitled to a favorable ruling as a matter of law.

2. NCCI is precluded by prior final order of DCBS from determining Code 3082 applies to the machining and pattern making operations of CSC.

OPINION

1. Summary determination standard.

OAR 137-003-0580 is titled "Motion for Summary Determination" and provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
>
> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing[.]
>
> * * * * *
>
> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

In the motion, CSC asserts NCCI is precluded, by a final order of DCBS in 1986, from determining Code 3082-Foundry-Steel Castings applies to its pattern making and machining operations.

As a starting point, in a contested case hearing, the proponent of a fact or position has the burden of proving that fact or position by a preponderance of the evidence. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Division*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390 (1987). Thus, CSC bears the burden to prove NCCI's determination was in error.

The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). Accordingly, any party advocating a particular position bears the burdens of production and persuasion as to that position.

As a starting point, the parties agree that CSC's operations and organizational structure have not changed in any relevant aspect between 1986 and today. Further, CSC asserts, and NCCI acknowledges, that the statutes and rules applicable to the assignment of worker compensation classification codes have not changed in any significant manner. Instead, NCCI argues that the current body of case law fundamentally altered the interpretation applied by DCBS in 1986 and thus warrants a divergent result.

The parties agree that, subsequent to a final order of DCBS issued in 1986, workers' compensation insurers including SAIF routinely classified CSC's operations using three separate codes for purposes of calculating worker compensation policy premiums; 3082-Foundry-Steel Castings, 2790-Pattern Making NOC, and 3632-Machine Shop NOC. In 2014, SAIF determined the 1986 final order was no longer binding and assigned classification code 3082 to all CSC operations. CSC appealed this classification decision to ORAC/NCCI, which upheld SAIF's determination. CSC asserts ORAC/NCCI and SAIF are precluded by the 1986 final order from assigning code 3082 to its pattern making and machining operations. NCCI argues that current interpretation of the statutory and regulatory scheme prohibit the application of claim or issue preclusion to this case. I disagree. For the reasons set forth below, I find ORAC/NCCI is required to uphold the 1986 final order from DCBS under the doctrine of issue preclusion.

2. Issue preclusion.

The doctrine of issue preclusion applies where (1) the issue to be determined is identical to that determined in a prior proceeding; (2) the issue was actually litigated and essential to a final decision on the merits of the prior proceeding; (3) the party to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which the court will give preclusive effect. *Nelson v. Emerald People's Util. Dist.*, 318 Or 99, 104 (1994), internal citations omitted. As the party asserting issue preclusion, CSC bears the burden of proving the first four of these elements. *Employment Dept. v. N.M.C. of Oregon*, 226 Or. App. 473, 490 (2009), citing *Barackman v. Anderson*, 214 Or App 660 (2007).

As CSC correctly argues, the doctrine of issue preclusion allows litigants to rely on the finality of prior adjudications by preventing re-litigation of the same controversy. In applying the doctrine of issue preclusion, the reviewing court or tribunal does not consider whether the prior adjudication reached the right result, but rather whether the parties had a full and fair opportunity to be heard on the relevant issue. *Durham v. City of Portland*, 181 Or App 409,429 (2002).

If CSC carries its burden on each of the first four elements above, it is entitled to a favorable ruling on the preclusive effect of the prior decision unless NCCI can demonstrate that the 1986 proceeding is not the type to which a court would give preclusive effect. *See*, *Barackman*, 214 Or App at 667, (2007).

In 1986, CSC appealed a determination by ORAC/NCCI upholding a decision by SAIF to apply classification code 3082- Foundry-Steel Castings to CSC's pattern making and machine shop operations. Subsequent to a contested case hearing and proposed order, DCBS issued a final order in favor of CSC. The final order found application of classification code 3082 to the pattern making and machine shop operations to be unfairly discriminatory because it required CSC to subsidize competitors operating in the pattern making and machine shop industries. The final order instructed NCCI to grant CSC's request for three distinct class codes. NCCI's determination thereafter was binding on SAIF as well as subsequent insurers. NCCI did not appeal the 1986 final order.

3. Preclusive effect of the prior order from DCBS.

As discussed above, the burden of proof as to the first four elements of issue preclusion lies with CSC. Fortunately for CSC, much of the factual background is not in dispute. As an initial matter, CSC must show that the issue to be adjudicated in this proceeding is identical to the issued adjudicated and decided in the prior proceeding. The issue in both actions asks if application of the single Foundry class is unfairly discriminatory to CSC in light of its unique operations. That issue is identical to the issue presented in this case. In fact, the parties acknowledge that the issues presented here are identical to those addressed by DCBS in 1986.

Next, it must be determined whether the issue was actually litigated and essential to a final decision on the merits in the 1986 proceeding before DCBS. This element is satisfied if the issue was necessarily decided to reach the final decision in the prior proceeding. *See*, *Heller v. Ebb Auto Co*., 308 Or 1, at 5-6 (1989). The final order issued by DCBS identifies the issues litigated and decided in the prior contested case. The disputed issue was the sole issue decided after a hearing on the merits.

CSC must also show that the party sought to be precluded had a full and fair opportunity to be heard on the issue in dispute. Here, CSC seeks to preclude NCCI from challenging a prior decision of DCBS on the applicability of a single classification code to three distinct operational units. As previously discussed, this issue was previously decided through a contested case proceeding before DCBS. Oregon law recognizes contested case hearings as adjudication proceedings which grant a full and fair opportunity to be heard for purposes of preclusion. *Washington County Police Officers v. Washington County*, 321 Or 430, 437 (1996). The prior dispute was decided after a full evidentiary presentation in a contested case hearing before a DCBS hearing officer. NCCI was a party to the 1986 proceeding and was permitted to present evidence and legal argument on the issue decided. In its responsive brief, NCCI does not assert that it was deprived, in whole or in part, of a full and fair opportunity to be heard in the prior proceeding.

In addition, CSC bears the burden of demonstrating that the party sought to be precluded was a party or was in privity with a party to the prior proceeding. This turns out to be a straightforward and undisputed issue. The parties in the current proceeding are the same as those appearing before DCBS in 1986. In fact, this dispute followed a nearly identical path to hearing as the prior dispute. In 1983 and 2014, SAIF issued a workers' compensation insurance policy classifying all employees of CSC's foundry, pattern making, and machine shop operations into a single classification code. In 1983 as in 2014, CSC appealed SAIF's decision to ORAC, the local representative of NCCI. In both instances, ORAC issued a determination upholding SAIF's decision to apply a single classification code. CSC then applied to DCBS for hearing. In that matter, as here, NCCI stands in the shoes of ORAC and advocates upholding a determination supporting a decision by SAIF. There is no evidence that NCCI, as the party to be precluded, was not a party or in privity with a party to the prior proceedings.

The evidence demonstrates CSC has satisfied its burden of proof with regard to the first four elements of issue preclusion.

Finally, it must be determined whether the prior proceeding was the type of proceeding to which a reviewing court will give preclusive effect. As identified above, the burden of proof on this element falls upon NCCI. If challenged, this fifth factor is determined by examining whether the administrative forum maintained formal and comprehensive procedures; whether the proceedings were trustworthy; whether the application of issue preclusion would facilitate prompt, orderly and fair problem resolution; and whether the same quality of proceedings and the opportunity to litigate is present in both proceedings. *Nelson*, 318 Or at 104 (1994); see also *North Clackamas School Dist. v. White*, 305 Or 48, 53 (1988).

NCCI does not assert that administrative adjudications are not, as a whole, the type of proceedings to which a court would give preclusive effect. Rather, NCCI argues that, under post-1986 case law, Oregon courts have held that administrative decisions are not entitled to preclusive effect where the statutory scheme anticipates or authorizes successive appeals arising out of the same transactional claim. *See*, NCCI's Response at 3. Specifically, NCCI cites to decisions in *Drews v. EBI Companies*, 96 Or App 1 (1989), *aff'd* 310 Or 134 (1990), and *Bruer's Contract v. National Council on Compensation Insurance*, 116 Or App 485 (1992) to support its contention that issue preclusion cannot apply to the classification determination in issue here. I disagree.

In *Drews*, the court determined that both issue and claim preclusion apply to administrative proceedings so long as the administrative tribunal's decision-making processes include certain requisite characteristics. 310 Or at 139. While the court in *Drews* spent significant time discussing why claim preclusion was not a bar to the litigation in issue in that case, it did not find, as NCCI implies, that issue preclusion was never applicable in workers' compensation cases. Because NCCI failed to demonstrate the decision making process employed by DCBS after full evidentiary hearing in 1986 did not include one or more of the required elements, this order does not discuss the court's opinion in *Drews* in further detail.

Next, NCCI argues that the court in *Bruer's*, *supra*, determined that preclusion was not applicable to the dispute in issue. Nonetheless, NCCI's argument misses the mark. In *Bruer's*,

the court found preclusion inapplicable in premium audit disputes because the legislature mandated insurers maintain a premium audit program that allowed employer's to dispute each successive premium audit. *Bruer's Contract v. National Council on Compensation Insurance*, 116 Or App at 489; see also, ORS 737.318.[4] At issue in this matter is a classification assignment dispute, rather than a premium audit dispute. Thus, neither the court's opinion nor the text the applicable statute is on point.

Finally, NCCI asserts intervening court opinions have altered relevant interpretation of provisions of the *Basic* and *Scopes* manuals applied by the insurer in this matter. NCCI cites to *Douglas County Farmer's Co-Op v. Nat'l Council on Comp. Ins.*, 119 Or App 69 (1993) and *Lemma Wine Co. v. Nat'l Council on Comp. Ins.*, 194 Or App 371 (1992), rev den, 315 Or 643 (1993) as supporting its position that recent interpretations of the Basic and/or Scope manual supports its determination rejecting the 1986 final order from DCBS. I do not agree.

In *Douglas County Farmer's*, the court addressed a farming co-op, which operated several departments or divisions, including a hardware and feed department. 119 Or App at 71. The court pointed out that the hardware and feed departments were located in the same building, shared the same management and accounting personnel, as well as shipping and receiving clerks, utilized a common conveyor belt for merchandise, and shared common utility bills. The court went on to find that the two departments were connected by a stairway for employee use only. *Id*.

Douglas County Farmer's did not present an employer that segregated its operations to the same degree as CSC. Importantly, the employer in that case did not segregate operational or administrative functions in distinct locations as CSC has done for over 30 years. Rather, the court pointed out that the employers housed all operations under a single roof. CSC's operations are distinguishable from those of the employers in *Douglas County Farmer's*. Thus, NCCI has failed to demonstrate that the court's opinion in that case presents a change in the interpretation of the statutory or regulatory scheme that would merit disregarding the 1986 final order from DCBS.

Lemma Wine dealt with the assignment of outside sales employees in the wine industry to Code 7390, applicable to distributors of beer and ale. 194 Or App at 375-376. In that case, the employer argued for application of the standard exception code 8742, applicable to outside salespersons where the general classification for an industry does not include salespersons. *Id*. The employer argued, inter alia, that because it had previously been assigned code 8742 for its outside salespersons prior to July 1999, code 7390 was inapplicable to its salespeople. Nonetheless, the court found that, effective July 1, 1999, NCCI adopted an amendment to the *Basic Manual* including outside salespersons in the wine industry within code 7390. The court found that, because the Basic Manual was amended to include outside salespersons and drivers

[4] In *Bruer's*, NCCI argued for the application of issue preclusion to an employer's dispute of a premium audit. Thus, the bulk of the court's opinion addressed the employer's right, under ORS 737.318, to challenge successive premium audit decisions issued by an insurer. The Court did not discuss any such rights granted to the insurer by the relevant statute. I decline the invitation to apply this opinion to unexpressed rights of insurers in premium audit or classification assignment disputes.

within the wine industry, the employer could no longer qualify for the standard exception code 8742.

Unlike the facts of *Lemma Wine*, the definitions and classifications in the *Basic* and *Scopes* manuals pertaining to the relevant classification codes are essentially unchanged today from those in place at the time of the prior proceeding. Thus, Lemma Wine provides no guidance and fails to support NCCI's position that legal interpretation of the statutory and regulatory scheme has changed to such a degree as to warrant disregarding the determination of DCBS in 1986.

NCCI failed to demonstrate the statutory scheme applicable to workers' compensation rate classifications anticipates or authorizes successive appeals arising out of the same transactional claim. Further, NCCI failed to show the statutory scheme has changed in any relevant manner to prevent application of a valid final order of DCBS. Nor has NCCI demonstrated that the 1986 contested case proceeding before DCBS is not the type of proceeding to which a court would give preclusive effect. Therefore, ORAC/NCCI is precluded from applying Code 3082 to Columbia Steel Casting, Inc.'s pattern making and machine shop operations under the final order of DCBS issued April 29, 1986.

RULING AND PROPOSED ORDER

Columbia Steel Casting, Inc.'s Motion for Summary Determination is GRANTED.

I propose the Department of Consumer and Business Services, Insurance Division issue the following order:

ORAC/NCCI is precluded from applying Code 3082 to Columbia Steel Casting, Inc.'s Pattern Making and Machine Shop operations under the Final Order of DCBS issued April 29, 1986.

Joe L. Allen
Senior 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. You may send exceptions via email to mitchel.d.curzon@state.or.us, or via mail to:

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

CERTIFICATE OF MAILING

On October 5, 2015 I mailed the foregoing RULING ON APPELLANT'S MOTION FOR SUMMARY DETERMINATION AND PROPOSED ORDER in Reference No. 14-11-003 to the following parties**.**

By: First Class Mail

Patrick C. Wylie
U.S. Bancorp Tower
111 SW 5th Ave Ste 2700
Portland OR 97204-3650

Jay W. Beattie
Lindsay Hart, LLP
1300 SW 5th Ave. Ste 3400
Portland OR 97201-5640

Ryan Clark
Administrative Specialist
Hearing Coordinator

STATE OF OREGON

DEPARTMENT OF COMMERCE

INSURANCE DIVISION

Before the Insurance Commissioner

In the Matter of the Petition of COLUMBIA STEEL CASTINGS, INC., Petitioner, and The Filings of the NATIONAL COUNCIL ON COMPENSATION INSURANCE and OREGON COUNCIL ON COMPENSATION INSURANCE, Respondents.	FINAL ORDER Case No. 83-7-6

Pursuant to Oregon Administrative Rules 836-05-107, the proposed decision of the Hearings Officer in the above-captioned matter is hereby adopted by the Insurance Commissioner of the state of Oregon as her final decision.

IT IS SO ORDERED this 29th day of April, 1986, at Salem, Oregon.

Josephine M. Driscoll

JOSEPHINE M. DRISCOLL
Insurance Commissioner

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review is pursuant to the provisions of ORS 183.482.

STATE OF OREGON
DEPARTMENT OF COMMERCE
INSURANCE DIVISION

Before the Insurance Commissioner

In the Matter of the Petition of COLUMBIA STEEL CASTINGS, INC., Petitioner, and The Filings of the NATIONAL COUNCIL ON COMPENSATION INSURANCE and OREGON COUNCIL ON COMPENSATION INSURANCE, Respondents.	PROPOSED ORDER Case No. 83-7-6

The above entitled matter came before the Insurance Commissioner pursuant to ORS 737.505 as a de novo classification appeal from a decision of the Oregon Classification and Rating Committee (OC&R Committee). The matter was heard following due notice to the parties on March 16, 1984 by Richard McGavock, Hearings Officer. Petitioner, Columbia Steel Castings, Inc., (Columbia) was represented by counsel, David R. Simon. Respondents, the National Council on Compensation Insurance (NCCI) and the Oregon Council on Compensation Insurance (OCCI) were represented by counsel, Mr. William Replogle.

Upon motion of the parties, the proceedings before the Insurance Commissioner were abated May 17, 1984 while the parties pursued settlement negotiations. These negotiations failing, the parties concluded their written arguments October 31, 1984.

Due to extraordinary Division circumstances, a timely decision of this case was delayed. Upon consideration of the evidence and arguments of the parties, the following disposition is made of this contested case.

FINDINGS OF FACT

A. Petitioner's Operations

Columbia manufactures steel castings, specializing in high strength, wear resistant manganese steel. Rough transcript (hereinafter "T") - 21. Castings vary in weight and size, from three pounds to 2,000 pounds. T-21. Columbia's products are used as parts in mining and milling equipment and include chain links, crusher jaws and wrecking balls. T-20, Petitioner's Exhibit D.

Columbia receives sales orders from district sales officers and directly from buyers. T-22. Orders are audited by a production manager who schedules work. T-22.

While Columbia operates as an integral company it has three separate divisions - pattern making, machine shop, and foundry. T-40, 41. The first two divisions do not perform work on a contract basis for a profit. T-44 and 95. The combined work of these divisions is not usually required in the production of Columbia's final product - steel castings. Columbia does not advertise the services of its pattern or machine shops, but for the company as a whole. T-45, 48, 82.

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The pattern making division creates patterns from engineered designs. T-23-24. At most, only five percent of the orders require productions of a new pattern. T-23. For 95% of the orders, existing patterns are utilized, either those stored in Columbia's warehouse (which stores some 13,000 patterns) or those provided by customers. T-25.

Skilled craftsmen with ability to visualize three dimensional concepts from engineered drawings and the physical dexterity to fashion wood or plastic into precise patterns work the pattern making shop. T-33. These are the highest paid hourly employees, receiving $16.90 per hour. T-33. They work in a separate building, free from exposure of the foundry and machine shops. T-38, and see Petitioner's Exhibit E. They are separately supervised, and take breaks in their own lunch area located in the pattern shop. T-34. Pattern making employees are represented by a separate union - the Mold, Model and Pattern Makers Guild of Portland. T-34. The craftsmen employed in the pattern shop do not interchange labor on a day to day basis with Columbia's other divisions. T-34. Respondent's Exhibit C-2. They provide services defined as pattern making under code 2790. T-106.

Castings are produced in the foundry. Foundry molders place patterns in appropriately sized steel flasks; sandslingers pack sand in the mold around the pattern. T-26.

Liquid steel, prepared in electric arc furnaces, is poured into the mold from overhead ladles. T-26. The mold is then colded, the outer flask removed, and the casting shaken to remove sand. Most castings are then heat treated. All are grinded, cleaned and inspected at the foundry. T-26, 113; Petitioner's Exhibit D-2.

Columbia employs approximately 225 foundry personnel. T-26. Most hired are unskilled, entry level people. While entry level wages are $5.19 per hour, the classified nonsupervisory wages approximate $11.12 per hour. T-28 and 29.

The foundry itself is located in a separate building. T-20, and Petitioner's Exhibit E. Foundry personnel are separately supervised, and they enjoy their own lunchroom and lounge area. T-29. The International Molders and Allied Workers, Local 139, represent foundry personnel through separately negotiated labor contracts. T-30. Foundry personnel do not interchange labor with other divisions. T-30; Respondent's Exhibit C-2.

At most, 20% of the castings produced in Columbia's foundry require specialized machining beyond the machine cleaning process utilized in the foundry. T-27. Normally, castings are cleaned and deburred in the foundry, pointed, and then shipped directly to the customers. T-26; Petitioner's Exhibit D-2.

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The separately housed, highly automated machine shops utilize large vertical boring mills, planners and drill processes to fashion castings requiring specialized work beyond the machine cleaning conducted in the foundry. T-28, 106. Machine shop employees must maintain journeyman skills. T-30-31. Machinists are involved in numerous different work processes, including boring, drilling, turning and planning. Machinists are represented by the International Brotherhood of Machinists and Aerospace Workers, Local 63, Portland, Oregon. T-31. The machinists are separately housed, separately supervised and enjoy a separate lunchroom and worker-shower facility. T-32, Petitioner's Exhibit E. Machine shop employees are paid $12.37 per hour and do not interchange labor with other departments. T-32; Respondent's Exhibit C-2.

Columbia maintains separate payroll records for the foundry, machine shops and pattern making shop, in accordance with NCCI Basic Rule IV, Section D-4. T-88-89, 110, 179; Petitioner's Exhibit B.

Columbia's three operations operate independently from each other. T-35&36. A shut down at one division does not prevent the operation of the other two divisions. T-36&37.

Columbia's operation is unique in Oregon. There exists no other operation classified code 3082 that operates separately housed and supervised foundry, pattern making and machine shop operations. T-194; Petitioner's Exhibit D.

B. The Rating Process

The OCCI is the Oregon serving branch of the NCCI, the licensed workers' compensation insurance rating bureau of this state. The OC&R Committee is the designated NCCI tribunal that hears initial ORS 737.505 grievances of Oregon employers.

Such tribunal is a panel of ten representatives from NCCI member insurers, including SAIF. T-4, Official Notice.

Approximately 500 classifications are available for use in Oregon by NCCI and their member insurers. These classes accommodate the categorization of some 60,000 Oregon employers. Respondent's Exhibit I. Under the "Open Competition - Modified File and Use" laws of ORS Chapter 737, all insurers including SAIF have adopted the NCCI Basic Manual and classification filings (except for deviations not relevant to the instant case) as their rating system. T-4, Official Notice.

The classification of employers into the various categories is an attempt to equitably spread the risk of work related injuries among employers.

> "The object of the classification system is to group employers into classifications so that the rate for each classification reflects the exposures common to those employers. Subject to certain exceptions described later in this rule, it is the business of the employer within a state that is classified, not the separate employments, occupations or operations within the business." T-4, Official Notice NCCI Basic Manual Rule IV, A.

The goal of the classification system is to group employers facing like risks in orders to promulgate pure premiums.

T-176. Fairness is the underlying consideration of classification. T-177. Initially, the insurer, and ultimately the OCCI and the OC&R Committee, determine what they believe to be the proper classification in accordance with their best underwriting judgments. T-4, Official Notices, and Respondent Exhibit I.

With certain exceptions, the governing classification at a specific location is the classification that produces the greatest amount of payroll. T-4, Officially Noting NCCI Basic Manual Rule IV Classifications, B., 5. and see Respondent's Exhibit D.

One of the exceptions is the NCCI "Separate Legal Entities" (formerly, "Single Enterprise") rule precluding a division of payroll between separate operations of a business notwithstanding the existence of a different and specific classification for each such operation. See Respondent's Exhibit E., Page 4. This rule reads:

> "Each separate legal entity insured under a policy shall be assigned to the basic classification which describes its entire business within a state. This assignment procedure applies even if the business is conducted at more than one location." Official Notice NCCI Basic Manual, Rule IV, D., 2., T-4.

Notwithstanding the "Separate Legal Entities" rule, NCCI would not hesitate to assign three separate classifications to Columbia's three separate divisions providing the existence of three corporations -- one for the foundry division, another for

the pattern making division, and another for the machine shop division. T-177, 183,-184, 186, and Respondent's Exhibit E.

Another NCCI exception is the "Assignment of Additional Basic Classification" (formerly "Multiple Enterprise") rule, which in relevant part states:

> "If a classification requires operations or employees to be separately rated or if an employer operates a secondary business within a state, an additional basic classification shall be assigned only if all the following conditions exist:
>
> a. The secondary business is conducted as a separate undertaking or enterprise. This condition does not apply if the classification wording requires the assignment of an additional classification for specified employees or operations. For example, some classifications direct that certain operations are to be separately rated.
>
> b. Separate payroll records are maintained for each business.
>
> c. Each business is physically separated by structural partitions and is conducted without interchange of labor.
>
> d. The assignment of the separate classification is not prohibited by wording of that classification or any other classification assigned to the policy." T-4, Official Notice: NCCI Basic Manual, Rule IV, D. 4. (July, 1980).

The object of the NCCI classification procedure is to assign the one basic classification which best describes the end product or service of a business. T-4, Official Notice: NCCI Basic Manual Rule IV, D. 1., Respondent's Exhibit E, and T-187.

The Insurance Division has repeatedly rejected the use of Rule IV A and D "end product or service" standards as

determinative classifying factor in previous contested cases, and formally disapproved such during the filing review of NCCI Item B-1155 submission of July, 1980. T-3 & 4, Official Notice.

C. NCCI's Application of the Rating System to Columbia

On March 25, 1983, Columbia initiated through SAIF an appeal of the unified "Code 3082-Foundry" classification assignment issued by OCCI. Respondent's Exhibit A. Columbia sought the additional separate classifications of Code 2790 and 3632 for its respectively separate pattern making and machining divisions.

In May, 1983, the OCCI confirmed Columbia's assignment to "Code 3082 -- Foundry-Steel Casting" as the governing and sole classification (other than the clerical and sales standard exceptions). OCCI reasoned Code 3082 adequately described insured's business citing Rule IV A guidelines classifying by the "business", and Rule IV B 4, "Assignment of Additional Basic Classifications" (Multiple Enterprise) guidelines.

OCCI, while recognizing three basic operations, nevertheless ascertained Columbia's "business" to be foundry through application of it's "end product" standard. Respondent's Exhibit D-1.

OCCI also noted that the footnote to Code 2790 -- Pattern Making forbids the assignment to a firm engaged in other

operations unless the 2970 exposure was conducted as a separate and distinct business. Respondent's Exhibit D-1.

At a June 9, 1983 hearing the OC & R Committee sustained the OC & R assignment of Code 3082 rejecting the prayed for additional assignment of Codes 2790 and 3632. The OC & R Committee resolved that Rule IV - A of the Basic Manual forbade the assignment of separate classifications for a single enterprise employer such as Columbia. Respondent's Exhibit E. The OC & R Committee employed the NCCI "end product" reasoning for grounding its decision on Rule IV A. Respondent's Exhibit E & F. The Committee's decision failed to explain the impact of "Machine Shop NOC -- Code 3632 "footnote, "Foundry operations to be separately rated." T-4 Official Notice and Respondent's Exhibit E.

While Columbia, with a $5.4 million payroll, generated 56% of the 1983 Code 3082 - Foundries Steel Castings pure premiums, it only incurred 41% of the losses reflected in such pure premiums. Compare Hearing Officer's Exhibit 1 with Petitioner's Exhibit A and Respondent's Exhibit B.

Columbia's anniversary rating date is April 1st. Respondent's Exhibit B.

ULTIMATE FINDINGS OF FACT

The assignment of the worker's compensation insurance classification "Foundry-Steel Castings - Code 3082" to pattern

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making and machine shop divisions of Columbia is unreasonable and produces an excessive rating.

The reasonable classifications for the pattern making division and the machine shops division are "Pattern-Making NOC--Code 2790" and "Machine Shop NOC -- Code 3632" respectively.

The NCCI received constructive notice of Columbia's classification grievance on March 25, 1983.

CONCLUSION OF LAW

Assignment of the classification Code 3082 to the pattern-making and machine shop divisions of Columbia contravenes ORS 737.310(1). Pursuant to ORS 737.045 and 737.505(3), the June 9, 1983 O C & R Committee's decision on Columbia may be reversed and the NCCI may be ordered to retroactively reclassify Columbia effectively as of its April 1, 1983 anniversary rating date to "Pattern-Making NOC -- Code 2790" respects its pattern making division and "Machine Shop NOC -- Code 3632" respects its machine shop division.

OPINION

The issue presented in this contested case is whether the assignment of worker's compensation unified classification "Foundry-Steel Castings--Code 3082" is unreasonable and produces an excessive rating.

In its Basic Manual for Worker's Compensation and Employer's Liability (1980), the NCCI outlines the basic rules it

uses in classifying employers' for worker's compensation insurance purposes. This manual has been approved for use in Oregon with one exception. The exception involves the interpretation of Rules IV A and D., Supra.

In applying rules IV a and D, the NCCI has traditionally focused on the end product or service of an employer's business in determining which classification best describes that business.

This emphasis on the end product or services has not been followed by the Insurance Division. See letter from W. W. Fritz, former Insurance Commissioner, to George Reall, former President of NCCI (April 4, 1980) (approving 1980 version of Basic Manual with qualifications as to Rules IV A and D). Instead, the Insurance Division has focused on the totality of circumstances in determining which classifications best describe an employers business. To limit the factors taken into account permits an employer to be unfairly discriminated against by assigning the employer to a classification with substantially less or significantly dissimilar exposures common to other employers within the classification. This same view was articulated in Will Vinton Productions v. NCCI, No. 77-11-5 (Or. Ins. Div. Nov. 27, 1978), in which it was said that "(t)he importance of simplicity in rate structure and administrative conveniences achieved in considering only the end product cannot outweigh the overriding need for rates and fair

procedures. If the end product was the sole determinant in these classification disputes, ORS 737.505(2) would be a nullity!" (Emphasis in original).

Therefore, an employer is to be assigned to those existing classification(s) which incorporate all of the characteristics of the employer's business as determined by examining the totality of circumstances. If no existing classification(s) exactly describes the employer's business, then an employer is to be assigned to that existing classification which incorporate most of the characteristics of the employer's business as determined by examining the totality of circumstances unless the employer's business has substantially less or significantly dissimilar exposures common to other businesses within the analogous classification and sufficient data as to risk exposure and loss experience is available, in which case the employer is to be assigned to a new classification.

In the instant case, Columbia's operation is unique. It is the only operation in Oregon to operate machine shops and a pattern making shop separate from its foundry operation. Here, the separate functions contemplated by Codes 3632 (machine shops) and 2790 (pattern making) more appropriately describe Columbia's operations. Failure to recognize this distinction would perpetuate Columbia's unfair annual subsidy of its Code 3082 competitors with integrated functions. Petitioner's

Exhibit D. Over $1 million of Columbia's separate pattern makers and machinists payroll flows into the pure premium development of Code 3082. Petitioner's Exhibit A and Hearings Officer Exhibit 1.

While the "Foundry--Steel Castings--Code 3082" classification does not forbid separate classification of Columbia's three divisions, the rule of "Machine Shop NOC--Code 3632" classification requires the foundry "to be separately classified" from the machine shop.

While the manual wording of "Pattern-Making NOC-Code 2790" classification precludes its assignment unless"...conducted as a separate and distinct business.", it unfortunately fails to define either phrase.

Similarly, the NCCI manual does not contain a definition of "foundry" beyond the additional phrase "Steel Castings". The manual provides no guidelines indicating which activities and occupations comprise foundry work.

The taint of the "end product" rule which has been purged from the single and multiple enterprise Rules IV A and D, must in this instant case be similarly stricken from Code 2790. We find that the subjective reasoning emanating from mere underwriting determinations in application of the scope of Code 2790 also work an injustice upon Columbia. Ratification of the application of Code 2790 limitations to Columbia would be unconscionable given NCCI's admission that if Columbia

separately incorporated its foundry, pattern making shop and machine shop, it would be entitled to the additional classifications, even assuming all other facts in this case remained the same.

NCCI's interpretation of the classification system relies not on risk exposure, the basic premise of the classification system, but rather on formality of legal organization. Consequently, Columbia's overpays approximately $38,000.00 in Code 3082 premiums each year to insure against foundry risks for employers who never see the inside of a foundry. Petitioner's Exhibit F, T-106.

It is axiomatic as we have said in Product Services v. NCCI, No. 80-1-3 (Or. Ins. Div., Mar. 31, 1982), "Application of the technical NCCI manual rules is a not wholly objective process. Classification underwriting, not unlike die making is not a science, but an art gained by experience. Some subjective reasoning creeps into the application of the rating system. The system's classifying methodology relies heavily upon good faith best judgment."

Here, the best judgment is that Columbia has met the requirements for assignment of the additional classifications for its machine shops and pattern making shop.

As a forum in equity, the Insurance Division must interpret the NCCI manual so as to avoid unreasonable results and to effectuate the objects for which the rules were promulgated.

See generally, James v. Carnation Co., 278 OR 65, 502 P2d 1142 (1977).

From the Findings of Fact herein, it follows that this matter is equitably resolved by reassigning the additional 2790 and 3632 Codes to Columbia. While this case is decided on the foregoing alone, having noted the subsequent failure of a NCCI response to the O C & R Committee's July 12, 1984 resolution "...that NCCI be directed to determine the advisability of establishing a separate class for machine shop operations which are run in conjunction with other manufacturing processes." ("NCCI's MEMORANDUM - OR-83-23-Columbia Steel Castings" July 12, 1984) justice demands such equity, as stated in Brooke v. Amuchaslegui, 226 OR 335, 341, 360 P2d 275(1961):

> "It is a general rule of equity that under a prayer for general relief, as here, the chancellor may shape his decree according to the equities of the case and will grant any relief warranted by the allegation of the bill and the evidence of the case." ***

Columbia prayed for reclassification retroactively as of the date on which the first classification hearing was held, June 9, 1983. This Division continues to follow its long standing rule of Will Vinton Production (No. 77-11-5, Or. Ins. Div., Nov. 27, 1978, at page 12) that the "...date of grievance notice is considered the just date for determining retro application of reclassification." While Columbia rendered such notice on March 25, 1983, it would be administratively expedient without harm to Petitioner to instead utilize

Columbia's normal anniversary rating date and policy inception of April 1st. Accordingly, the reactive reclassification would appropriately be effective April 1, 1983.

ORDER

IT IS HEREBY ORDERED that the June 9, 1983 O C & R Committee decision on Columbia Steel Castings, Inc. by the Oregon Classification and Rating Committee of the National Council on Compensation Insurance be reversed.

IT IS FURTHER ORDERED that the National Council on Compensation Insurance, through its Oregon representative, Oregon Council on Compensation Insurance, shall reclassify forthwith Columbia Steel Castings, Inc. to "Pattern-Making NOC--Code 2790" respects its pattern making division, and "Machine Shops NOC--Code 3632" respects its machine shop division.

IT IS ALSO ORDERED that the foregoing reclassification for Columbia Steel Castings, Inc. shall apply retroactively to April 1, 1983.

Dated this 25th day of March, 1986 at Salem, Oregon.

Richard McGavock
Hearings Officer

NOTICE: Pursuant to ORS 183.460, you are entitled to file written exceptions to the Insurance Commissioner. Written exceptions and a request to present argument must be filed with the Insurance Commissioner within 30 days following the date of mailing of the Proposed Order.

Pursuant to ORS 183.464, if written exceptions are not filed with the Insurance Commissioner within 30 days, this Proposed Order will become final.