



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

IN THE MATTER OF:

WAVERLY WOOD, LLC

and

ACUITY INSURANCE COMPANY

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**Docket No. 12.28-201780A
WC Appeal – Insurance**

FINAL ORDER

This matter was heard on March 9, 2021, before the Honorable Mattielyn B. Williams, Administrative Law Judge, appointed by the Secretary of State, with Ms. Maliaka Bass, Deputy General Counsel to the Commissioner, Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner’s Designee, Ms. Bass makes the final determination in this matter as to Findings of Fact and Conclusions of Law. Waverly Wood, LLC (hereinafter referred to as “Petitioner”) was represented at the hearing by Mr. Robert I. Thomason, Jr. of Porch Peeler Williams Thomason. Acuity Insurance Company (hereinafter referred to as “Respondent”) was represented at the hearing by Mr. Todd Hancock of Ferraro Hancock and Associates, PLLC.

JURISDICTION

The Commissioner of the Department of Commerce and Insurance (“Commissioner”) has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-109(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 issues raised by the Petitioner's April 9, 2020 appeal are as follows:

- (1) Whether the Petitioner's employees in question should be classified under Code 8232-Lumberyard, as is the position of the Petitioner.
- (2) Whether the Petitioner's employees in question should be classified under Code 2710-Sawmill, as is the position of the Respondent.

FINDINGS OF FACT

1. The Petitioner is a Tennessee limited liability company that has been in business since 2008. The business and wood yard of the Petitioner are located on property owned by Rambling R, LLC and consist of approximately eleven (11) acres. (Waverly Wood, LLC Brief, p. 1)
2. The primary business of the Petitioner is the purchase of timber and timber tracts. The Petitioner then sells green lumber to buyers. (Tr. p. 15, l. 5)
3. The Petitioner hires a subcontractor logging crew to do all the harvesting of the logs. The Petitioner hires persons to unload the raw logs into the wood yard. (Tr. p. 27, l. 23-25; Tr. p. 28, l. 10-13; Tr. p. 30, l. 1-3)
4. A knuckle boom is used to unload the trailer of logs and a forklift truck moves the logs within the wood yard if needed. (Tr. p. 28, l. 19-25)

5. Also located on the property are a stave plant, a scrag plant, and a tie plant, none of which are owned or operated by the Petitioner. (Waverly Wood, LLC Brief, p. 2)
6. The “wood yard” owned by the Petitioner is located approximately two hundred (200) feet from the pallet plant, and approximately one hundred seventy-five (175) feet from the tie plant owned by Richardson TN, Inc. (Exhibits 1 and 2; Tr. p. 13, l. 5-9; Tr. p. 32, l. 13-16)
7. Employees of these entities come to the wood yard and move the logs purchased by the other entities to the respective places where manufacturing processes are engaged. (Waverly Wood, LLC Brief, p. 2)
8. The Respondent is the workers’ compensation carrier for the Petitioner.
9. On or about July 19, 2018, the Respondent conducted an on-site audit of the Petitioner’s operations and observed two (2) of the Petitioner’s employees unloading raw logs from trucks and placing the logs in the wood yard. (Waverly Wood, LLC Brief, p. 2; Tr. p. 12, l. 1-8)
10. The Respondent classified the two (2) employees as Code 2710-Sawmill for the purposes of workers’ compensation, rather than Code 8232-Lumberyard. (Exhibit 4, p. 3)
11. The Petitioner’s employees’ primary job is loading the logs onto a loader and unloading the logs as they come into the wood yard. (Tr. p. 12, l. 7-8; Tr. p. 24, l. 22-23)
12. Richardson, TN, Inc. operates as a sawmill, is a sub S corporation, and is one hundred percent (100%) owned by James Richardson. (Tr. p. 10, l. 4-6; Tr. p. 11, l. 23-25)
13. The Petitioner is owned by James Richardson and his son, Todd Richardson, with Todd being the majority owner with fifty-one percent (51%), and James owning forty-nine percent (49%). (Tr. p. 10, l. 9-11)

14. Both Richardson, TN, Inc. and the Petitioner are owned by Rambling R, LLC, a business entity owned by James and Todd Richardson. (Tr. p. 32, l. 18-25)
15. Richardson, TN, Inc. and the Petitioner are each insured by separate insurance companies. (Tr. p. 20, l. 16-18)
16. The National Council on Compensation Insurance (“NCCI”) Inspection & Classification Report listed the “Employer Name” as Richardson, TN, Inc. and the Petitioner. (Exhibit 4, pg. 1; Tr. p. 36, l. 5-6)
17. Richardson, TN, Inc., an entity located in near proximity to the Petitioner that operates as a sawmill, is sometimes known by the trade name of Waverly Wood. (Exhibits 1 and 2; Tr. p. 37, l. 24-25)
18. The Petitioner, an entity that purchases timber and timber tracts, is a separate company from Richardson TN, Inc., dba Waverly Wood.
19. The Petitioner submits that it does not own or operate the sawmill, nor are its employees qualified to operate any of the machinery in the sawmill. (Acuity Insurance Company Brief, p. 1)
20. The Commissioner has designated the NCCI to assist in gathering, compiling, and reporting relevant workers’ compensation insurance statistical information.
21. A case was opened with the NCCI and was referred to Michael Craddock (“Mr. Craddock”) for review. (Acuity Insurance Company Brief, p. 2)
22. Mr. Craddock found that the Respondent properly classified the employees because the handling of raw logs at a sawmill site is contemplated under Code 2710. (Acuity Insurance Company Brief, p. 2)

23. Mr. Craddock also found that Code 8232-Lumberyard does not contemplate the handling of raw logs, only finished lumber. (Acuity Insurance Company Brief, p. 2)
24. The Petitioner appealed the decision of Mr. Craddock to the Tennessee Workers' Compensation Appeals Board ("Board") in February of 2020. (Waverly Wood, LLC Brief, p. 2)
25. The Board issued a decision in March of 2020 finding that the Respondent applied the proper classification. (Waverly Wood, LLC Brief, p. 2-3)

CONCLUSIONS OF LAW

26. Pursuant to Tenn. Comp. R. & Regs. 1360-04-01-.02(3) and (7), the Petitioner has the burden of proof to show that the issues should be resolved in its favor by a preponderance of the evidence standard.
27. Pursuant to Tenn. Code Ann. § 56-5-110, a licensed rate service organization may advise about rate questions and provide supporting information for rates. Tenn. Code Ann. § 56-5-110.
28. Pursuant to Tenn. Code Ann. § 56-5-120, in pertinent part:
- (a) The commissioner may designate a rate service organization to assist in gathering, compiling and reporting relevant workers' compensation insurance statistical information.
 - (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.

29. According to Tenn. Code Ann. § 56-5-109(c):

After notice and hearing in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, the commissioner may impose a civil penalty of up to ten thousand dollars (\$10,000) per occurrence, upon a finding that a workers' compensation insurer, without any lawful basis, has assessed an employer premium:

- (1) For individuals who are not employees; or
- (2) On the basis of improper classification of employees.

30. The NCCI's Basic Manual for Workers' Compensation and Employers Liability Insurance Code ("NCCI Manual"), as approved by the Commissioner, authorizes the NCCI to assign classifications and determine the propriety of classification assignments. (Exhibit 4, p. 1)

31. The NCCI Manual classifies certain employees as 2710-Sawmill. (Exhibit 4, p. 4)

32. The NCCI Manual classifies certain employees as 8232-Lumberyard New Materials Only- All Other Employees & Yard Warehouse Drivers. (Exhibit 4, p. 4)

33. As per Rule 1-B-5 of the NCCI Manual, the Governing Classification at a specific job or location is the classification, other than a standard exception classification, that produces the greatest amount of payroll. (Exhibit 4, p. 4)

34. In the NCCI Manual, Code 2710-Sawmill is assigned to employers engaged in sawing logs into desired lengths to produce rough lumber by use of circular carriage or band saws. This classification includes employees engaged in grading, removing, and sorting lumber at the conveyor called the "Green Chain," as it comes from the saws or sawmill, and storage of the green lumber in the yard. Any subsequent dry kiln operation or stacking and air-drying operations or the handling of the processed lumber in the yard, loading of trucks or delivery is assigned to Code 8232. (Exhibit 4, p. 4)

35. In the NCCI Manual, Code 8232-Lumberyard New Materials Only-All Other Employees & Yard Warehouse Drivers applies to the handling of processed lumber in the yard, loading of trucks, and delivery. (Exhibit 4, p. 4)
36. The NCCI Manual, compiled by the NCCI and utilized in Tennessee, describes Code 2710 as “Sawmill” and includes the scope of activities which involve “removing and sorting lumber,” along with “storage of green lumber in the yard.” (Acuity Insurance Company Brief, p. 3)
37. There is a cross reference in Code 2710 of the NCCI Manual that identifies “storage and subsequent handling of processed lumber [is] to be separately rated as Code 8232-Lumberyard.” (Acuity Insurance Company Brief, p. 3)
38. Regarding Code 8232, the NCCI Manual includes language describing the code as being applicable to “those employees . . . and dealers performing the sale and distribution of other new building materials such as . . . lumber . . . which are processed or manufactured by other concerns.” (Acuity Insurance Company Brief, p. 3)
39. Pursuant to Tenn. Comp. R. & Regs. 0780-01-82.10, in part:
 - (1) The commissioner shall issue an order within sixty (60) days of the date of the receipt of the transcript of the hearing . . .
 - (2) Orders issued under Paragraph (1) of this Rule:
 - (a) Shall contain Findings of Fact based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding;
 - (b) May utilize the commissioner’s experience, technical competence and specialized knowledge in the evaluation of evidence[;]
 - (c) Shall contain Conclusions of Law as to whether there was a proper application of the insurer’s or rate service organization’s rating system to the appellant’s insurance coverage;

- (d) Shall order the payment of any unpaid premiums owed by the insured to the insurer as a result of the proper application of the insurer's or rate service organization's rating system to the appellant's insurance coverage;
- (e) Shall order the return or crediting of premiums paid by a insured that were not lawfully owed due to the improper application of the insurer's or rate service organization's rating system to the appellant's insurance coverage;
- (f) Shall specify the amount of time the insured has to make payment;
- (g) Shall assign the costs of the appeal, in the commissioner's discretion, to the non-prevailing party;
- (h) Shall order that an insurer is not entitled to premiums invoiced or billed to the insured due to the incorrect application of the insurer's or rate service organization's rating system to the appellant's insurance coverage; and
- (i) May impose civil penalties of up to ten thousand dollars (\$10,000) per occurrence upon a finding that a workers' compensation insurer, without any lawful basis, has assessed an employer premium:
 - 1. For individuals who are not employees; or
 - 2. On the basis of improper classification of employees.
 - 3. In determining whether to impose a civil penalty, under T.C.A. § 56-5-309(c), the Commissioner may take into account the facts and circumstances of the particular appeal under review, including whether the action by the insurer was in good faith based on the information available to it at the time the action was taken.
 - 4. Any penalties assessed under this Chapter shall be made payable to the Department.

40. The Petitioner has failed to show by a preponderance of the evidence that the employees working for the Petitioner should be categorized as lumberyard employees instead of sawmill employees.

41. The facts, as stated in Paragraph 3, 9, and 11, demonstrate that the Petitioner's employees unload green lumber into the wood yard.

42. The evidence provided at the hearing demonstrated that the two (2) employee classifications that have been considered for purposes of classifying the Petitioner's employees are classification 2710-Sawmill and classification 8232-Lumberyard.

43. The evidence provided at the hearing demonstrated that the 2710-Sawmill classification contemplates the handling of green lumber. (Paragraphs 22 and 34).

44. The evidence provided at the hearing demonstrated that the 8232-Lumberyard classification contemplates the handling of processed lumber. (Paragraphs 23 and 35.)

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

1. The Petitioner's employees were properly classified 2710-Sawmill because the employee classification describes the handling of green lumber within the parameters of this job classification.
2. The Petitioner's employees cannot be classified as 8232-Lumberyard because the classification contemplates only the handling of processed lumber.
3. The Respondent acted lawfully in assessing a premium based upon a proper classification of employees.
4. Costs of this proceeding are taxed against the Petitioner, Waverly Wood, LLC, or other successor to Waverly Wood, LLC.

5. The total premium owed as well as all costs of this proceeding shall be paid by the Petitioner within thirty (30) days of the date of entry of this Final Order.

Any party requesting judicial review should follow the Notice of Appeal Procedures attached to this Final Order.

This Final Order is entered and effective on May 20, 2021.



Maliaka L. Bass, Commissioner's Designee
Deputy General Counsel to the
Commissioner

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the 24 day of May, 2021.



Stephanie Shackelford, 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. 0780-1-82-.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)(1)(A)(i) Proceedings for review are instituted by filing a petition for review in chancery court.

(ii) Except as provided in subdivisions (b)(1)(B), venue for appeals of contested case hearings shall be in the chancery court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the chancery court of Davidson County.

...

(iv) Petitions seeking judicial review 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

I hereby certify that a true and exact copy of the within and foregoing document has been sent by U.S. Mail and Certified Mail, postage prepaid, to the following on May 20, 2021.

Cert. Mail Receipt: 7020 2450 0000 4540 0825
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Cert. Mail Receipt: 7020 2450 0000 4540 0818
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OFFICE OF THE CLERK OF THE SUPREME COURT

Jenny Taylor, Associate General Counsel
and Supervising Attorney