

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

QUEAL ENTERPRISES, INC.,)	
Petitioner)	
)	
vs.)	Docket No. 3927-APP
)	
TRAVELERS INDEMNITY COMPANY,)	
Respondent)	

FINAL ORDER

On January 13, 2009 at the Kansas Insurance Department, 420 S.W. 9th Street, in the City of Topeka, County of Shawnee, and State of Kansas, before Hearing Officer, Mr. Robert M. Tomlinson, in the above-captioned matter and hereby makes the following findings and enters the Order as follows:

Procedural Issues

This matter comes before the Hearing Officer as a result of an Appeal by QUEAL ENTERPRISES, INC., to the Kansas Insurance Department June 17, 2008 of a National Council on Compensation Insurance, Inc., "NCCI" decision on behalf of Travelers Indemnity Company concerning the classification of Queal Enterprises for workers' compensation purposes. The Appeal of the classification comprises the basis for the Hearing Officer's decision.

Issues

1. Whether or not NCCI or Travelers Indemnity Company can be expected to provide an absolute classification for a unique, one of a kind, hand made piece of machinery (tree machine) used in Petitioner's business operation.
2. Whether or not the Kansas Department of Revenue's designation of Petitioners equipment as agricultural is relevant to the NCCI classification in this case.
3. Whether respondents actions in changing the classification from an existing classification of clearing range of brush and trees for utilization of land for farming or livestock grazing from NCCI Class Code 0050 (Farm Machinery Operation-By Contractor) to the NCCI Class Code 2702 (Logging and Lumber) was appropriate.

Decision

1. NCCI and Respondent provided sufficient effort to identify an absolute classification for the unique, one of a kind piece of machinery used by Petitioner. After due consideration it is ruled that the NCCI appeals panel heard, questioned, and deliberated on Petitioner's case before issuing its decision. Both the Respondent and NCCI's investigations of Petition complaint prior to the classification change was appropriate and in compliance with due process provisions.

2. The Petitioner argued that the description of his business activities; "clearing range of brush and trees for utilization of land for farming or livestock grazing is appropriately agricultural and that its nature is in preparing the soil for cultivation;" and as such his equipment is taxed as agricultural. Mr. Queal testified that he uses a tree cutting machine that he built, which has been declared by the State of Kansas for tax purposes as a piece of farm machinery. And as such, he has been working under class code 0050, "farm equipment for hire," until he was reclassified by Respondent. While showing deference and understanding to Petitioner's arguments, it is ruled that: "..... the tax definition of any piece of machinery is absolutely irrelevant to the risk involved, and so the argument that it is taxed as an agricultural entity is moot. That determination has nothing whatsoever to do with the risk to the operator of that machine."

3. The NCCI classification is an adequate fit for the business activities of the Petitioner. The Petitioner first argues that NCCI definitions are not clear, and nothing that they have speaks specifically to the machinery used in his operation. The second thing he argued was that the machinery used in his business was agricultural in nature, cultivating, and clearing the land for greater use. He indicated in oral arguments that the classification of his hand made, one of a kind tree machine boiled down to a matter of common sense.

It is reasoned that the focus of the NCCI definitions cannot be absolute, but instead it is a framework to provide a reasonable rating of the risk of injury to the operator. That's what it's

designed to do. Again, the Petitioner indicated that the machinery was hand-built, and there is no other piece of machinery quite like it on the surface of the earth. It is further reasoned that it is absolutely impossible, and certainly impracticable, for NCCI to draft codes that speak specifically to a one-of-a-kind piece of machinery. What we are left with is a common sense interpretation of the risk to the operator. Mr. Queal, in his arguments, has indicated that he would prefer that definition, and believes that it is appropriately agricultural and that its nature is in preparing the soil for cultivation.

Conclusion.

IT IS HEREBY MY DECISION that the focus of the NCCI definitions cannot be, in this particularly case, absolute because of the definition of cultivate, as argued by Mr. Queal does not apply. It is further my decision that the operation of the “tree machine” as described by Petitioner is not a cultivator. While giving deference to Mr. Queal’s own words “that we have to apply common sense”; and after considering various other arguments of Petitioner and Respondent, it is finally my decision that none of the definitions argued adequately describes the one-of-a-kind machine used in Mr. Oueal’s operation as Farm Machinery.

THEREFORE, the change of the NCCI Class Code 0050 (Farm Machinery Operation-By Contractor) to NCCI Class Code 2702 (Logging and Lumber) was appropriate. All other findings and conclusions of law stated by the Hearing Officer on the record January 25, 2009 are herein incorporated as if fully set forth in this Final Order.

NOTICE OF RIGHTS

Pursuant to K.S.A. §77-601 et seq., Queal Enterprises, Inc., is entitled to judicial review of this Final Order. The petition for judicial review must be filed within thirty (30) days of service of this Final Order (Plus three (3) days for service by mail pursuant to K.S.A. §77-531). In the event Queal Enterprises, Inc., files a petition for judicial review pursuant to K.S.A. §77-613(e),

the Agency Officer to be served on behalf of the Kansas Insurance Department is:

John W. Campbell, General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

**IT IS SO ORDERED ON THIS 9th DAY OF MARCH, 2009 IN THE CITY OF TOPEKA,
COUNTY OF SHAWNEE, STATE OF KANSAS.**



 /s/ Robert Tomlinson

Robert M. Tomlinson

Hearing Officer

Prepared By:

 /s/ John R. Dowell, S.Ct. #11504

For: Eliehue Brunson
Staff Attorney

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the above **Final Order** was transmitted by U.S. Mail, postage prepaid, on this __9th__ day of March, 2009, to:

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_s/ John R. Dowell, S.Ct. #11504_____

For: Eliehue Brunson