

**STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

**In re: Customer Engineering Services
Docket No.: INS No. 20-079-AP**

PROPOSED DECISION AND ORDER

Appearance for Petitioner:

Scott Priz, Esq.
Neczus, Inc.

Appearance for Respondent:

Karen Asher-Cohen, Esq.
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Hearing Officer:

Michelle Heaton, Esq.
NH Insurance Department

1. Summary

Customer Engineering Services (“CES” or “Petitioner”) is an employer with New Hampshire employees. Petitioner disputes Mitsui Sumitomo Ins. USA Inc.’s (“Mitsui” or “Respondent’s”) use of the workers’ compensation rate classification code 3724 for some of the field service technicians in New Hampshire for policy years 2015-2016, 2016-2017, and 2018-2019. Petitioner submitted sufficient evidence to demonstrate that classification code 5191 is the appropriate code that best describes CES’s business in New Hampshire. Classification code 3724 is the appropriate additional operation code for the technician servicing commercial imaging equipment in an industrial setting. Classification code 5192 is the appropriate interchange of labor code to apply for the servicing of vending machines.

2. Procedural Background

In January 2019, CES began questioning whether Mitsui had assigned the proper classification code to its business. After being unable to come to an agreement regarding the appropriate classification code, CES initiated the National Council on Compensation Insurance (“NCCI”) Dispute Resolution Process. On October 8, 2020, the New Hampshire Workers Compensation Appeals Board (“Board”) held

a hearing regarding the classification dispute in accordance with the Dispute Resolution Process as approved by the Commissioner. The Board issued a decision on October 14, 2020, finding that no changes should be made to the classifications. Petitioner timely filed an appeal of the Board's decision with the Insurance Department on November 13, 2020.

An evidentiary hearing was held virtually using WebEx video conferencing on March 22 and 24, 2021. The following exhibits were submitted jointly by the parties and admitted at the hearing:

Exhibits:

- Exhibit 1 - NCCI Decision Notice (10/14/2020)
- Exhibit 2 - NCCI Agenda Materials for 10/8/2020 Hearing
- Exhibit 3 - *Basic Manual*, Premium Basis and Payroll Allocation (2001 Edition)
- Exhibit 4 - *Basic Manual*, Assignment of More Than One Basic Classification (2001 Edition)
- Exhibit 5 - Composite - States' Worker's Compensation Appeals Board Decisions (New Hampshire, Alabama, Florida, Illinois, Kentucky, Louisiana, Virginia, Maryland, Tennessee, Georgia)
- Exhibit 6 - *Scopes*[®] *Manual* 5191
- Exhibit 7 - *Scopes*[®] *Manual* 3724
- Exhibit 8 - Mitsui Risk Engineering Survey (01/08/2014)
- Exhibit 9 - Mitsui Risk Engineering Survey (05/04/2015)
- Exhibit 10 - Loss Control Plan for CES 2009-2010 (05/12/2009)
- Exhibit 11 - Loss Control Review/Plan for CES 2009-2011 (05/2010)
- Exhibit 12 - Loss Control Review/Plan for CES 2010/2011 (05/2011)
- Exhibit 13 - CES Job Site Photographs
- Exhibit 14 - 2009 CES Meeting Agenda (05/13/2009)
- Exhibit 15 - 2010 CES Meeting Agenda (05/12/2010)
- Exhibit 16 - 2011 CES Meeting Agenda (05/17/2011)
- Exhibit 17 - 2012 CES Stewardship Meeting Presentation (05/22/2012)
- Exhibit 18 - 2013 CES Stewardship Meeting Presentation (05/21/2013)
- Exhibit 19 - 2013 CES Program Design Meeting Presentation (12/04/2013)
- Exhibit 20 - 2014 CES Stewardship Meeting Presentation (05/12/2014-05/13/2014)
- Exhibit 21 - 2015 CES Stewardship Meeting Presentation (05/18/2015)
- Exhibit 22 - 2016 CES Stewardship Meeting Presentation (05/16/2016)
- Exhibit 23 - 2017 CES Stewardship Meeting Presentation (05/22/2017)
- Exhibit 24 - 2018 CES Stewardship Meeting Presentation (05/21/2018)
- Exhibit 25 - Smith Email to Zaeh Re CES (03/02/2019)
- Exhibit 26 - Smith Email to Schilling and Zaeh Re CES (03/04/2019)
- Exhibit 27 - Smith Email to Schilling RE Dallas inspection (03/22/2019)
- Exhibit 28 - Smith Email to Zaeh and Schilling Re CES (04/06/2019)
- Exhibit 29 - Email Exchange Between Mitsui Staff and Broker (04/06/2019-04/09/2019)
- Exhibit 30 - Schilling Email to NCCI Re CES (04/09/2019)
- Exhibit 31 - Smith Email to Hope Re NCCI (04/14/2019)
- Exhibit 32 - Smith Email to Schilling Re Inspection Report (04/18/2019)
- Exhibit 33 - 2018-2019 CES WC Policy, With Endorsements
- Exhibit 34 - CES Policy Term Audit 2008-2009, 11/19/2009
- Exhibit 35 - CES Policy Term Audit 2009-2010, 09/26/2011

- Exhibit 36 - CES Policy Term Audit 2010-2011, 02/28/2012
- Exhibit 37 - CES Policy Term Audit 2011-2012, 01/31/2013
- Exhibit 38 - CES Policy Term Audit 2012-2013, 11/27/2013
- Exhibit 39 - CES Policy Term Audit 2013-2014, 06/24/2015
- Exhibit 40 - CES Policy Term Audit 2014-2015, 02/09/2016
- Exhibit 41 - CES Policy Term Audit 2015-2016, 12/22/2016
- Exhibit 42 - CES Policy Term Audit 2016-2017, 11/06/2018
- Exhibit 43 - CES Policy Term Audit 2017-2018, 05/06/2019
- Exhibit 44 - CES Policy Term Audit 2018-2019, 10/02/2019
- Exhibit 45 - CES NCCI Experience Modifications
- Exhibit 46 - Purported CES 5191 and 5192 Employees Who Worked on Large Equipment
- Exhibit 47 - Composite – Photos of Large Equipment
- Exhibit 48 - Composite (48-1 through 48-4) – CES Work Orders (2015-16, 2016-17, 2017-18, 2018-19)
- Exhibit 49 - *Basic Manual*, Rule 2-F-1, Idle Time
- Exhibit 50 - Purported CES 5191 and 5192 Employees - States Worked by Policy Year
- Exhibit 51 - Comparison of Hourly Wages in Payroll Summaries Exhibit to Ex. 2 of CES's Ex. 66
- Exhibit 52 - Comparison of Astea Data to CES' Exhibit 62
- Exhibit 53 - Comparison of CES' Ex. 2 of Ex. 66 to CES' Ex. 62
- Exhibit 54 - Transcript excerpts from testimony given in July 16, 2020 in Case No. 262028-20, Florida Office of Insurance Regulation:
 - Jerry Hope (pages 1-5);
 - Christian Fridholm (pages 6-15);
 - Steven Zaeh (pages 16-31); and
 - Catherine Tralha (pages 32-36)
- Exhibit 55 - NCCI *Scopes*[®] *Manual* – Classification Code 5191
- Exhibit 56 - NCCI *Scopes*[®] *Manual* – Classification Code 5192
- Exhibit 57 - NCCI *Scopes*[®] *Manual* – Classification Code 3724
- Exhibit 58 - NCCI Rule 1-d-3, Assignment of More Than One Basic Classification
- Exhibit 59 - NCCI Rule 2-G, Interchange of Labor
- Exhibit 60 - New Hampshire Audit pages
- Exhibit 61 - Payroll Summaries
- Exhibit 62 - Hourly Work Summary and Payroll Breakdown
- Exhibit 63 - NCCI Texas Inspection & Classification Report
- Exhibit 64 - Samples of printers
- Exhibit 65 - Pages from Workers' Compensation Policy
- Exhibit 66 - Agenda Materials for the 10/08/2020 NH Appeals Board meeting
- Exhibit 67 - NH Astea Data
- Exhibit 68 - NCCI *Basic Manual* Rule 2-F-1
- Exhibit 69 - Spreadsheet of Surveys

During the hearing, Petitioner presented testimony by Jerry Hope, CES's Chief Financial Officer, and Christian Frindholm, FujiFilm North America's Vice-President and General Manager of the Technical Services Division. Respondent presented testimony by Catherine Tralha, a Premium Audit Manager at Mitsui, and Steven Zaeh, Mitsui's Regional Underwriting Executive Vice-President for the Midwest Region. Following the conclusion of the hearing, both parties submitted proposed findings and rulings.

The record for this proceeding closed on May 10, 2021. All requested findings of fact and rulings of law consistent with this order are granted and all others are denied.

3. Standard of Review

The Department reviews all appeals from the Board *de novo*. Accordingly, no deference is given to the factual findings or legal ruling from the Board. Instead, all factual findings and legal rulings are based on the evidence presented by the parties during this proceeding. The Petitioner, CES, has the burden of demonstrating by a preponderance of the evidence that the Commissioner should not uphold the Board's ruling.¹

4. Findings of Fact

4.1 Background

CES is a Colorado corporation with its principal place of business in Colorado.² CES employs service technicians who service a variety of imaging and other equipment in 50 states.³ FujiFilm holds service contracts with various customers to service equipment sold by FujiFilm and others.⁴ FujiFilm uses CES as a subcontractor to fulfill the service contracts.⁵ CES only provides services through FujiFilm contracts.⁶ FujiFilm organizes its technical service department into two parts, one focusing on retail printing and the other on commercial printing.⁷ The retail printing side services office printers, retail vending machines, and on-site photo operations at large retailers and independent storefronts.⁸ The other side, commercial printing, consists of servicing commercial printing businesses.⁹ The type of equipment a technician works on depends on their geographical location as well as their particular certifications.¹⁰ Not all technicians are trained and certified on all equipment serviced by CES.¹¹

¹ New Hampshire Administrative Rule Ins 206.05.

² Stipulation of Facts, p.1.

³ *Id.*

⁴ *Id.* at 12-13

⁵ *Id.* at 13.

⁶ Hearing transcript March 22, 2021 at 20-21.

⁷ *Id.* at 8, 22-25.

⁸ *Id.* at 133-134.

⁹ *Id.* at 134.

¹⁰ *Id.* at 124.

¹¹ *Id.* at 146.

CES operates as a virtual company.¹² Employees work out of their homes using company laptops and phones and will travel to job sites within their geographic region.¹³ FujiFilm uses Astea, a proprietary software program, to track operations.¹⁴ When FujiFilm opens a service job in Astea, the job is assigned to a CES technician. The CES technician uses their laptop or phone to access the Astea software and will enter particulars about the service call including what equipment was serviced, what parts were used, travel time to the site, and the amount of time spent on-site. Both CES and FujiFilm use the Astea system to manage operations on a daily basis.¹⁵

CES first obtained workers' compensation insurance from Mitsui in 2008.¹⁶ For the policies effective July 10, 2008 until July 10, 2011, Mitsui used classification code 5191 for CES's service technicians in New Hampshire.¹⁷ Mr. Zaeh testified that Mitsui initially rated CES at 5191 because CES's insurance broker thought that was the appropriate risk classification.¹⁸ Mr. Zaeh testified that following some high-risk years "it was evident that the workers' comp loss experience for CES couldn't be supported by code 5191."¹⁹ Mr. Zaeh testified that the injuries Mitsui was seeing for workers' compensation were injuries that would be associated with working on heavy equipment.²⁰ Mitsui asked their premium audit manager to research the risk codes and the manager opined that code 3724 was more fitting for work with heavy equipment.²¹ The policy starting July 10, 2011 changed CES classification code from 5191 to 3724 to better account for CES's actual loss experience.²² Veruschka Zachtshinsky, NCCI's Regulatory Disputes Consultant, confirmed that classifying a risk based on the insured's loss experience is not in accordance with the NCCI manual.²³

¹² *Id.* at 129, 17-22.

¹³ *Id.* at 129-130.

¹⁴ *Id.* at 142.

¹⁵ *Id.* at 28, 135-136.

¹⁶ Stipulation of Facts.

¹⁷ *Id.*

¹⁸ Hearing transcript March 24, 2021 at 121.

¹⁹ *Id.* at 122; see also Ex. 2 at 55-56.

²⁰ *Id.* at 122.

²¹ *Id.* at 123.

²² Ex. 2 at 55-56.

²³ *Id.* at 53.

In January 2019, CES expressed a concern regarding the class codes assigned by Mitsui.²⁴ The parties agreed to have the NCCI conduct an inspection. An NCCI representative conducted an inspection in Texas and the inspector issued his report on April 3, 2019.²⁵ Following the inspection report, the parties continued to disagree regarding the appropriate classification code. On June 24, 2019, CES initiated the Dispute Resolution process with the NCCI regarding Mitsui's use of class code 3724 for policy years 2015-2016, 2016-2017, 2017-2018, and 2018-2019.²⁶

4.2 Disputed Classifications

The parties dispute the applicability of codes 3724, 5191 and 5192 to the work provided by New Hampshire technicians. The NCCI *Scopes*[®] *Manual* includes, in part, the following description for code 3724:²⁷

Code 3724 applies to contractors specializing in the erection or repair of heavy machinery or equipment at their customers' locations, which may include plants, factories, and mills. This classification also applies to contractors specializing in the installation or repair of electrical apparatus at their customers' locations. The term "electrical apparatus" means electrical power equipment such as, but not limited to, heavy motors, generators, converters, transformers, compressors, and power switchboard equipment... Certain Code 3724 operations are designated as "not otherwise classified" (NOC). These NOC operations apply to an employer only when no other classification more specifically describes the employer's operations. The following is a representative list of operations somewhat related in nature to Code 3724 operations that are not assigned to Code 3724.

3726 Boiler Installation or Repair-Steam
7539 Electric Light or Power Co.-NOC-All Employees & Drivers
5160 Elevator Erection or Repair
5146 Furniture or Fixtures Installation-Portable-NOC
5191 Office Machine Installation, Inspection, Adjustment or Repair
3719 Oil Still Erection or Repair
7600 Telecommunications Co.-Cable TV, or Satellite-All Other Employees & Drivers
5192 Vending or Coin Operated Machines-Installation, Service or Repair & Salespersons, Drivers

²⁴ Ex. 66 at 59.

²⁵ Ex. 63.

²⁶ Ex. 2 at 27-28.

²⁷ NCCI *Scopes*[®] *Manual*.

Code 3724 is specifically classified as a construction and erection operation.²⁸ The NCCI *Scopes*[®]

Manual includes, in part, the following description for code 5191:²⁹

Code 5191 contemplates the installation, inspection, adjustment or repair of all types of office machines such as, but not limited to, calculators, computers and computer-related equipment (modems, printers, etc.), copy machines, fax machines, microfilm equipment, postage machines and typewriters. To qualify for Code 5191, an insured must engage in operations away from the insured's shop. An insured who repairs or services equipment exclusively in the insured's shop is either assigned to the manufacturing class of the products being repaired or serviced, or assigned to another repair or service code that describes the operation.

The installation, inspection, adjustment or repair includes all dead wiring work necessary to the point of plugging the mechanism into the live wire circuit, disassembling equipment, replacing the necessary parts, reassembling and cleaning.

Code 5191 is also applied to the installation, inspection, adjustment or repair of cash registers, scales of the counter-type variety, soap dispensers and X-ray equipment...

The NCCI *Scopes*[®] *Manual* includes, in part, the following description for code 5192:³⁰

Code 5192 contemplates those insured engaged in the installation, service or repair of all types of vending or coin operated machines which are placed in locations owned or occupied by others. Machines contemplated by this classification may dispense merchandise (such as cigarettes, candy, gum, and soft drinks), provide services (such as automatic teller machines, parking meters, scales, lockers, clothing washing or drying and dry cleaning machines), provide traffic control such as those traffic control arm devices used at toll booths or certain parking lots to control passage of vehicles until a condition is met and, finally, provide amusement (such as pinball, bowling, video games, and juke boxes).

Code 5192 is an all-inclusive classification that includes sales, storage and delivery of machines, installation, repair, replenishment of stock, and collection of receipts.³¹

4.3 CES Operations

4.3.1 Retail Technicians

On the retail side of the business, CES technicians will travel to various locations in different states to service a variety of equipment including photo processing printers, inkjet printer, office printers, computers, monitors, vending machines, and packaging machines.³² The printers serviced vary in size

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 51 and 134; Ex. 48 and 67.

from small enough to fit on a desk to larger freestanding printers.³³ New Hampshire technicians routinely serviced desktop printers such as the FujiFilm Frontier Series DX100 pictured below in *Figure 1*.³⁴ The photo-processing printers are large printers used in retail stores to print photos for customers from digital files.³⁵ The larger freestanding printers are similar in size to a copy machine. The Frontier LP5700 shown in *Figure 2* below is an example of one of the photo lab printers serviced by New Hampshire technicians.³⁶ The photo kiosk, *Figure 3* below, consists of a computer, screen, and printer assembled together in a freestanding cabinet for customer self-service.³⁷ The vending machines are large freestanding vending machines that contain various merchandise such as cosmetics, skin care products, toiletries, prescription medications, and other items.³⁸ The Proactiv[®] vending machine pictured below in *Figure 4* is one type of vending machine frequently serviced by New Hampshire technicians.³⁹ The packaging machines consist of large freestanding equipment used to automate various tasks in pharmacies.⁴⁰



Figure 1. FujiFilm DX100



Figure 2. Frontier LP 5700

³³ Ex. 47, 48, 64, and 67.

³⁴ Ex. 48, 64 and 67.

³⁵ Testimony of Jerry Hope and Christian Frindholm; Ex. 13.

³⁶ Ex. 48, 64, and 67.

³⁷ Ex. 48, 64, and 67.

³⁸ Ex. 13, 47, 48, and 67.

³⁹ Ex. 47, 48, and 67.

⁴⁰ Ex. 47, 48, and 67.



Figure 3. Photo Kiosk

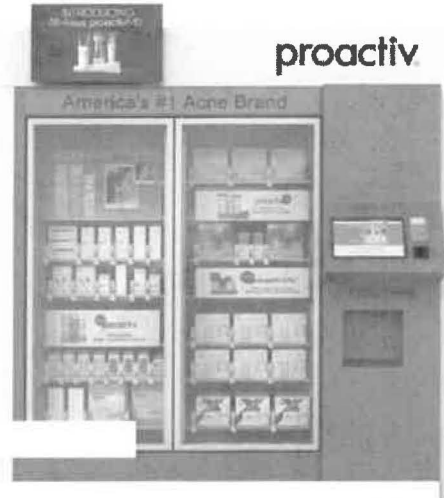


Figure 4. Proactiv® Vending Machine

Technicians use basic hand tools such as screwdrivers, wrenches, voltage meters, etc. to install new equipment and perform general service and maintenance of equipment.⁴¹ Service consists of repairing and replacing rollers, gears, belts, and electronic readers.⁴² CES technicians do not deliver or move equipment and do not lift any equipment over 50 pounds.⁴³ Technicians working on the retail side of the business are not trained on the commercial graphics equipment's and do not take service calls for this equipment.⁴⁴

Mr. Hope testified that CES technical service representatives work on the same types of equipment throughout the country.⁴⁵ In New Hampshire, CES employed seven different employees during the years in dispute.⁴⁶ Six of these employees only serviced equipment categorized under the retail side of the business as described above. None of these technicians worked on any industrial or commercial graphics equipment.⁴⁷ The majority of jobs completed by New Hampshire technicians

⁴¹ Hearing transcript March 22, 2021 at 51.

⁴² *Id.* at 51, 54, 150.

⁴³ Hearing transcript March 22, 2021 p 25.

⁴⁴ Hearing transcript March 22, 2021 at 21.

⁴⁵ *Id.* at 18.

⁴⁶ Ex. 48 and 67.

⁴⁷ *Id.*

related to servicing of photo processing equipment and other office machines.⁴⁸ The servicing of vending machines is a smaller portion of the work completed by retail technicians in New Hampshire.⁴⁹

4.3.2 Commercial Printing Technicians

The equipment serviced on the commercial printing side consists largely of computer plate equipment or flatbed printers used in in large commercial printing distribution locations.⁵⁰ These machines are much larger than the equipment seen on the retail side and can take up an entire room.⁵¹ Installation involves heavy parts and the equipment has complex service requirements.⁵² The commercial printing side of the business mostly consists of FujiFilm employees, but there are some CES technicians as well.⁵³ Less than 10% of CES employees, about 50 employees nationwide, work on this large commercial graphics equipment.⁵⁴ Technicians working on the commercial printing side are highly trained and only work on commercial graphics equipment. The parties do not dispute that the CES technicians that work on commercial graphics equipment are properly classified using code 3724.

Only one CES employee in New Hampshire, Richard Loomis, worked on commercial imaging equipment.⁵⁵ Mr. Loomis was not a CES employee in New Hampshire during plan year 2015-2016.⁵⁶ New Hampshire did not have any technicians servicing commercial graphics equipment during plan year 2015-2016.⁵⁷ For plan years 2016-2019, Mr. Loomis traveled to Massachusetts, Connecticut, Rhode Island, Maine, Vermont, New York, South Carolina, Pennsylvania, and Illinois to service commercial imaging equipment.⁵⁸

4.4 Mitsui's Analysis of New Hampshire Employees

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Hearing transcript March 22, 2021 at 19, 134, and 151.

⁵¹ *Id.* at 19-21.

⁵² *Id.* at 21-22.

⁵³ *Id.* at 151.

⁵⁴ *Id.* at 19-20, 151.

⁵⁵ Ex. 48 and 67; Hearing transcript March 22, 2021 at 20.

⁵⁶ Ex. 48 and 67.

⁵⁷ *Id.*

⁵⁸ *Id.*

Mr. Zaeh testified that CES technicians worked on large printers, very large kiosks, and vending machines that require a lot of heavy lifting and moving heavy parts and equipment.⁵⁹ After reviewing pictures of the machines included in Exhibit 64, Mr. Zaeh testified that the depicted machines were not representative of all the types of machines New Hampshire technicians were required to service.⁶⁰ He also commented that CES technicians are required to drive excessively and that 16% of the workers' compensation claims were auto related, though he conceded that driving is not a factor considered in any of the disputed classification codes.⁶¹ Mr. Zaeh stated Mitsui would conduct risk-engineering survey every year to monitor the type of work conducted by CES technicians.⁶² However, Mitsui never conducted an inspection for New Hampshire employees and never asked for any documents to confirm the type of work done by New Hampshire technicians.⁶³ Mitsui just applied code 3724 in all NCCI states.⁶⁴ Mr. Zaeh opined that the risk-engineering survey reports supported Mitsui's use of class code 3724.⁶⁵

In a January 8, 2014 letter to CES, John Harp, a Senior Risk Engineering Consultant for Mitsui, described a jobsite visit he had performed with a CES technician to repair a photo printer at a retailer in California.⁶⁶ Mr. Harp noted that technicians are required to lift parts weighing under 50 pounds and use hand tools.⁶⁷ Potential hazards noted by Mr. Harp were electrical hazards, repetitive movements relating to removing hardware, bending, lifting, and kneeling to access different parts of the machines, and extensive driving.⁶⁸ The letter did not contain any reference to classification codes.

Mr. Harp wrote another letter to CES dated May 4, 2015 detailing his observations of a jobsite visit at a medical center in Texas to repair a scrub vending machine.⁶⁹ He described the machine as

⁵⁹ Hearing transcript March 24, 2021 p 122.

⁶⁰ *Id.* at 144.

⁶¹ *Id.* at 137 and 175.

⁶² *Id.* at 130.

⁶³ Hearing transcript March 22, 2021 at 33; Hearing transcript March 24, 2021 at 176.

⁶⁴ Hearing transcript March 24, 2021 at 176.

⁶⁵ *Id.* at 130.

⁶⁶ Ex. 8.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Ex. 9.

large, and noted the technician lifted approximately 40 pounds.⁷⁰ The letter stated the technician used a wide variety of hand tools.⁷¹ Mr. Harp noted many of the same types of hazards he had previously noted in the January 8, 2014 letter.⁷² The letter did not contain any reference to classification codes.

4.5 Texas Inspection Classification Report

NCCI inspector Bill Deen conducted an inspection of CES operations in Texas and prepared an Inspection Classification Report dated April 3, 2019.⁷³ Mr. Deen observed that service technicians installed, serviced, and repaired either office, photo processing, and vending machines or commercial graphic and printing machines.⁷⁴ In his report, Mr. Deen describes the types of office, photo processing, and vending machines serviced by technicians.⁷⁵ He noted that technicians use basic hand tools to perform tasks such as removing and replacing rollers, gears, motors, etc. in all three types of machines.⁷⁶ Technicians also update computer software.⁷⁷ The report included photos of the FujiFilm Frontier LP 5700 machine as an example of photo processing equipment.⁷⁸ Mr. Deen noted. “[t]he photo processing equipment is very similar to the standard office printers installed and serviced.”⁷⁹

The report also describes the large graphic printing machines installed, serviced and repaired for commercial printing companies.⁸⁰ Mr. Deen described the two commercial printers he observed as being 24 feet long and 12 feet wide and 15 feet long by 15 feet wide.⁸¹ Prior to installation of these machines, customers must have the equipment delivered and any necessary electrical or plumbing work completed.⁸²

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Ex. 63.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

The technician will then connect the separate pieces and any electrical or plumbing connections for the machine.⁸³ The technician also levels and calibrates the machine to exact specifications.⁸⁴

Mr. Deen opined in his report that Code 5191 was the proper classification code for technicians installing, servicing and repairing office machines and photo processing equipment located in a retail setting.⁸⁵ His report states, “[t]he photo processing equipment by analogy is included with the office type machines listed.”⁸⁶ He concluded code 5192 is the appropriate code for vending machine service operations.⁸⁷ However, in Texas, interchange of labor is not allowed for basic classifications.⁸⁸ Mr. Deen found that code 3724 was the proper code for technicians installing and servicing the commercial printing equipment.⁸⁹ Assignment of a basic classification for an additional operation is allowed in Texas for code 3724 as it is a construction code.⁹⁰

4.6 Payroll Records

Part Five, section F of CES’s policy issued by Mitsui requires the policyholder to “keep records of information needed to compute premium.”⁹¹ Mr. Hope testified that CES employees log their time in and time out on timecards using a program called ADP.⁹² CES uses the ADP program to process their payroll.⁹³ The ADP system does not track the type of equipment worked on, specifics of the job site, or the specific amount of time worked at any particular job site.⁹⁴ The Astea system tracks the specific information relating to a job site, including the type of equipment serviced and the specific amount of time at each job site.⁹⁵ Mr. Hope testified that during the payroll audits, he provided the auditors with all

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Ex. 65, p 5.

⁹² Hearing transcript March 22, 2021 at 74-75.

⁹³ *Id.* at 26-27.

⁹⁴ *Id.* at 27-28.

⁹⁵ *Id.* at 27-28.

the documents requested.⁹⁶ Mr. Hope testified that the Mitsui payroll auditor never asked him to split the payroll into different classification codes until after the Texas inspection.⁹⁷

Catherine Tralha has been a premium auditor for approximately 16 years and has been involved in approximately 25,000 audits.⁹⁸ When conducting an audit, Ms. Tralha testified that she would request from the insured verifiable payroll information.⁹⁹ This would include timecards, job cost records, HR records, job descriptions, and other similar documents.¹⁰⁰ Ms. Tralha explained, “verifiable payroll records are records that an auditor can match up against an insured's payroll system and that an auditor can verify that the information is accurate and verify that there are no discrepancies...”¹⁰¹ By way of example, she explained:

as an auditor if we are given a report that reflects that on week ending 7-12-2020 John Smith worked four hours on equipment type X, then the expectation would be that there would be either a time card that would match up to that or a work order that would reflect the time this employee spent on that.¹⁰²

She confirmed that it is the insurer’s responsibility to request the necessary records during a premium audit.¹⁰³ She stated that Mitsui did not ask CES to provide records detailing the work of New Hampshire technicians.¹⁰⁴ Ms. Tralha testified that these records would have been necessary to breakdown the payroll into different class codes.¹⁰⁵

Mr. Zaeh testified that CES never provided Mitsui with the Astea data detailing the technicians’ jobs and added that he was confident the Astea data did not exist during the time in question.¹⁰⁶ Mr. Zaeh testified that Mitsui asked CES each year for a breakdown of employees by classification code during the premium audit and CES could never produce one.¹⁰⁷ Following the Texas inspection, Mitsui does not

⁹⁶ *Id.* at 72.

⁹⁷ *Id.* at 72.

⁹⁸ Hearing transcript March 24, 2021 at 51-52.

⁹⁹ *Id.* at 56.

¹⁰⁰ *Id.* at 56.

¹⁰¹ *Id.* at 57.

¹⁰² *Id.* at 113.

¹⁰³ *Id.* at 90.

¹⁰⁴ *Id.* at 93.

¹⁰⁵ *Id.* at 93.

¹⁰⁶ *Id.* at 139-140.

¹⁰⁷ *Id.* at 161.

dispute that CES provided Mitsui with a report that split Texas's employees' wages between codes 5191 and 3724 and Mitsui accepted this report.¹⁰⁸

5. Legal Analysis and Discussion

5.1 Policy Years in Dispute

Mitsui argues that the classification codes cannot be changed for prior policy years because CES never disputed the code being applied during payroll audits and continued to renew its policy each year. RSA 412:35, I requires, in part, that the insurer charge premium based on the policyholders "actual exposure existing during the term of the policy coverage." The insurer is responsible for assigning the appropriate classification code and performing an appropriate payroll audit in order to determine the proper charge for the actual exposure. Any acquiescence by the insured does not excuse the insurer from complying with the requirements of RSA 412:35.

Furthermore, CES is not agreeing to the charges as they are actively contesting Mitsui's application of classification code 3724. The NCCI *Basic Manual* Appendix G Dispute Resolution Process Rule 2-i provides, in part, that "Policyholders requesting dispute resolution services from the Administrator must do so within three years after the policy expiration date for the Policy in dispute." CES initiated the Dispute Resolution Process on June 24, 2019. The 2015-2016 policy expired on July 10, 2016. CES properly initiated the dispute process with respect to policy years 2015-2016, 2016-2017, 2017-2018, and 2018-2019.

5.2 Disputed Classifications

The NCCI *Basic Manual* provides that classification codes are assigned based on the business of the employer and not the individual occupations or operations within the business.¹⁰⁹ The applicable code is the code classification that best describes the business within a state.¹¹⁰ Code 5191 is the proper classification code that best describes CES's business in New Hampshire. The description for

¹⁰⁸ *Id.* at 114.

¹⁰⁹ NCCI *Basic Manual* – 2001 Edition Rule 1.A.

¹¹⁰ NCCI *Basic Manual* – 2001 Edition Rule 1.D.

classification code 5191 describes exactly the primary type of work performed by CES technicians. The undisputed evidence demonstrates that CES technicians are responsible for “[t]he installation, inspection, adjustment or repair includ[ing] all dead wiring work necessary to the point of plugging the mechanism into the live wire circuit, disassembling equipment, replacing the necessary parts, reassembling and cleaning” of all types of office equipment.¹¹¹ The Astea data as well as the undisputed testimony of Mr. Hope and Mr. Fridholm demonstrate that servicing and repair of office equipment is CES’s primary operation in New Hampshire.

Code 5192 is the appropriate code for New Hampshire technicians when servicing vending machines. Code 5192 is an all-inclusive code specific to installation, service or repair of all types of vending machines. The undisputed evidence demonstrates that CES technicians in New Hampshire service vending machines. The amount of time spent servicing vending machines varied each year, but was never greater than the amount of time spent servicing other office equipment. Therefore, code 5191 remains the appropriate code for CES’s primary business in New Hampshire.

Code 3724 is the appropriate code for the one technician in New Hampshire that services commercial machines. Classification Code 3724 applies to contractors specializing in the erection or repair of heavy machinery or equipment, or electrical apparatus in plants, factories, and mills.¹¹² There is nothing in the description for code 3724 that would suggest it could be applied to servicing printers, photo processing equipment and vending machines located in retail locations and other locations open to the general public. The description for code 3724 even lists codes 5191 and 5192 as codes that are somewhat related in nature but not assigned to 3724. Little evidence was presented regarding the type of work performed by CES’s commercial imaging technicians, however, the parties do not dispute that 3724 is the appropriate code for these technicians.

Mr. Deen’s Inspection Report for the Texas operations is persuasive and supports classifying retail technicians under code 5191. Although the inspection is specific to Texas employees, the services

¹¹¹ NCCI *Scopes*[®] *Manual*. Code 5191.

¹¹² NCCI *Scopes*[®] *Manual*. Code 3724.

and equipment detailed in the report are very similar to the services provided by New Hampshire technicians. Specifically, Mr. Deen found that the work on photo processing equipment was more akin to work in an office setting than a commercial plant or factory and that photo processing equipment was analogous to the office equipment listed in the 5191 code description. In his inspection, Mr. Deen observed some of the same printers serviced by technicians in New Hampshire.

Mitsui disputes that the photo processing equipment is an “office machine” within the meaning of code 5191. The photo processing machines are large printers similar in size to a copy machine. Both printers and copiers are specifically included in the description for code 5191. The tasks performed on the photo processing printers are the same tasks described in code 5191 and are the same types of tasks performed on other office equipment. CES stated, and Mitsui did not present any evidence to the contrary, that its technicians are not responsible for delivering or moving the equipment and do not perform any plumbing or electrical work that may be necessary for the equipment. The technicians only connect equipment parts and perform software installation. These installation services are clearly not analogous to the installation of equipment referenced in code 3724, which includes the installation of heavy motors, generators, converters, transformers, and power switchboard equipment in an industrial setting.

Mitsui repeatedly highlights the size of the equipment when arguing the technicians are appropriately classified under 3724. However, codes 5191, 5192, and 3724 do not include any size or weight requirements. The description for code 5191 provides a non-exhaustive list of some types of office equipment and specifically includes copiers in that list. Similarly, code 5192 is specific to vending machines. Copiers and vending machines are typically large, freestanding machines. Other than highlighting the size of the equipment, Mitsui did not present any evidence to support its conclusion that 3724 was the appropriate classification code for employees servicing equipment in the retail division. Additionally, there was no evidence presented to indicate that the retail technicians in New Hampshire serviced any equipment in an industrial setting as contemplated by code 3724 or that the tasks performed

on the retail equipment was in anyway analogous to the service requirements for the commercial graphics equipment.

The MSIG reports likewise support the finding that servicing photo processing equipment and vending machines is not within the scope of code 3724. Mr. Harp details in his reports that although the machines are large, technicians do not lift over 50 pounds and only use hand tools to perform their work. One inspection occurred at a retailer and the other at a hospital. The MSIG reports do not provide any specifics that would support classifying the work performed under code 3724.

Mr. Zaeh's testimony regarding the type of work performed by CES technicians is unpersuasive. Mr. Zaeh stated technicians worked on large machines and were required to lift heavy equipment. However, he never explained the basis for this knowledge nor did he provide any specifics to support his conclusion. Likewise, he stated the machines depicted in Exhibit 64 were not representative of the machines New Hampshire technicians serviced, but again provided no basis for that opinion and admitted that Mitsui never conducted an inspection for any New Hampshire technicians.

5.3 Assignment of Classifications and Interchange of Labor

The NCCI *Basic Manual* Rule 1.D provides that the basic classification that best describes the business is applied to all employees. In New Hampshire, code 5191 best describes the majority of work performed by New Hampshire technicians. However, to a lesser extent the New Hampshire business does engage in activities that could be classified under 5192 and 3724. NCCI *Basic Manual* Rule 1.D.3.b provides that more than one basic classification may be assigned to a business that engages in construction or erection as an additional operation. Since code 3724 is classified as a construction and erection code, it may be used in conjunction with code 5191 for the one New Hampshire employee servicing commercial imaging equipment. NCCI *Basic Manual* Rule 1.D.3.c.3 states that when an insured engages in more than one activity in a state, if the additional activity is not included in the classification of the principal business and is rated higher, the higher classification is assigned to the additional activity.

NCCI *Basic Manual* Rule 1.D.3.d also states in part, “[e]ach distinct type of construction or erection operation must be assigned to the class that specifically describes the operation only if separate payroll records are maintained for each operation.” Absent separate payroll records, the highest rated classification is assigned to that job or location.¹¹³ Mitsui argues that CES did not keep proper payroll records so this rule requires 3724 to be applied to all technicians, as it is the highest rated classification. Mitsui incorrectly applies Rule 1.D.3.d. Rule 1.D.3.d contemplates distinct types of construction and erection operations and is specific to the job or location. Since code 5191 is not a construction and erection code and is a separate business operation, it is not applicable to the situation described in Rule 1.D.3.d. Mitsui’s argument also conflicts with Rule 1.D.3.c.3 which clearly provides that a higher classification may be applied to an additional operation not included in the classification of the principal business even absent appropriate records breaking down the payroll.

Even if Rule 1.D.3.d was applicable, it is applied to each job site or location. Each time a technician performs a service call, the technician is working at a different job site or location often times in different states. Therefore, the applicable code would depend on the services provided at the specific job site. Furthermore, RSA 412:32, V requires that for employees involved in construction, erection, or installation, “[t]he payroll for employees hired for a specific job project shall be assigned to the state in which the job is located.” Since Code 3724 is a construction, erection, and installation code, the New Hampshire technician that services the commercial imaging equipment associated with code 3724 should have his payroll assigned to the state in which each job is located.

More than one classification code may be used for an individual employee when the insured engages in more than one operation in a state.¹¹⁴ For this interchange of labor to apply, the *Basic Manual* requires the insured keep records that include the actual time the employee spends in each job classification and pay an hourly wage rate comparable to such employees in the industry.¹¹⁵ These rules

¹¹³ NCCI *Basic Manual* – 2001 Edition Rule 1.D.3.d

¹¹⁴ NCCI *Basic Manual* – 2001 Edition Rule 1.D.3.c.4

¹¹⁵ NCCI *Basic Manual* – 2001 Edition Rule 2-G.

are specific to an individual employee performing work in different class codes as opposed to the business engaging in operation that can be classified under separate classification codes as discussed above.

CES technicians servicing commercial imaging equipment do not service retail equipment and vice versa. Therefore, this interchange of labor rule would only apply to employees classified under 5191 who also serviced vending machines. For the retail technicians, Code 5191 is the principal code as it best describes CES's business in New Hampshire. However, the service of vending machines is properly classified under code 5192. Where records exist that document the actual time a technician spends working on vending machines classified under 5192, code 5192 should be applied instead of code 5191.

5.4 Payroll Records

Mitsui argues that the Astea data cannot be considered because it is not a verifiable payroll record maintained by CES. Mitsui argues that the Astea data is not a record maintained by CES as the data is maintained by FujiFilm. CES's business is designed to act exclusively as a subcontractor for FujiFilm service contracts. The Astea program contains the specific job details for all the service calls conducted by CES technicians including the specific amount of time spent on each job and the equipment involved in each job. CES has access to this program and uses it on a daily basis to manage its business. As part of the job responsibilities, CES technicians are required to input data into the Astea system for each job. Given CES's regular access and use of the Astea program and that CES employees are responsible for creating the data specific to CES operations, it is clear that CES maintains the Astea records.

Mitsui next argues that the Astea data is not a payroll record as it does not contain hourly rates and does not contain classification codes. However, there is no requirement that an employer maintain a single record or document that contains all information relative to payroll. The NCCI *Basic Manual* does not define payroll records. It only provides that "[r]ecords must reflect actual time spent working within each job classification and an average hourly wage comparable to the wage rates for such employees within the employer's industry."¹¹⁶ Estimated or percentage allocation of payroll is specifically not

¹¹⁶ NCCI *Basic Manual* – 2001 Edition Rule 2.G.2.a.

permitted.¹¹⁷ The *Basic Manual* does not provide any further specifics regarding the information or format required for payroll records. Additionally, the language of the policy issued by Mitsui only requires the policyholder keep records and does not specify any requirements or format for keeping the records.

The Astea data is a record that contains information regarding the actual time each employee spends at a specific job site and the equipment serviced at that site. In conjunction with other CES records, such as the ADP records, the Astea data can be used to quantify actual exposure and satisfies the requirements outlined in the *Basic Manual*. Ms. Trahla testified that when conducting a premium audit the auditor would typically request and review a variety of documents including work orders. The Astea data is an electronic version of a work order. An entry is created in the system when a service request is made and then is assigned to the appropriate CES technician who fulfills the request.

Mitsui's argument that the job site records are not verifiable because they had not been previously provided during the audits is not persuasive. The carrier is responsible for assigning the appropriate classification code and requesting the necessary documents during an audit. If the carrier fails in properly performing one of its duties and the policyholder initiates a dispute, it would seem illogical and unfair to limit the evidence considered in the dispute resolution process to only those documents the carrier chose to consider during the time in dispute. Mitsui had assigned code 3724 to all New Hampshire employees, but did nothing to confirm the 3724 was the appropriate classification during any of the premium audits or at any other time. Mr. Hope and Ms. Trahla both testified that Mitsui never asked CES to produce detailed specifics regarding the type of work conducted by CES's New Hampshire technicians. Mr. Zaeh also testified that code 3724 was assigned to New Hampshire technicians simply because New Hampshire is an NCCI state.

Furthermore, any information that can be used to quantify a policyholder's actual exposure in accordance with RSA 412:35 should be considered when calculating the premium. During an audit, the

¹¹⁷ NCCI *Basic Manual* – 2001 Edition Rule 2.G.2.b.

insurer may take steps to verify that the information provided is reliable, and may choose not to consider information that cannot be verified or is found to be unreliable. However, an insurer cannot refuse to consider relevant information and documents without proper vetting. In his testimony, Mr. Zaeh claimed the Astea data did not exist and the only payroll data CES had was from ADP. It is incredible to believe that CES and FujiFilm would create years' worth of detailed job data for every job worked by a CES technician. Additionally, Mitsui presented no evidence to demonstrate that the Astea data was unreliable, that the data could not be verified, or that Mitsui took any steps to try to verify the information in the Astea reports.¹¹⁸

Mr. Zaeh also testified unpersuasively that Mitsui asked CES for a breakdown of payroll by class code every year. Such a request seems contradictory to Mitsui's assertion that 3724 is the correct classification for New Hampshire technicians. In order for CES to have been able to breakdown payroll by class code, Mitsui and CES would have had to be in agreement regarding which class code applies to each type of equipment. It is clear from this proceeding that the parties have been unable to come to an agreement on the applicability of the different classification codes. Finally, CES was able to provide such a breakdown of payroll following the Texas inspection demonstrating that it was possible once it was clear what machines and tasks fell into each classification code.

6. Conclusion

Based on the foregoing, I propose ordering Mitsui to apply the classification codes to CES's New Hampshire employees in accordance with the above analysis for policy years 2015-2016, 2016-2017, 2017-2018, and 2018-2019.

Date: June 9, 2021



Michelle Heaton, Hearing Officer

¹¹⁸ Mitsui noted several inconsistencies in the payroll summaries included in Exhibits 61, 62, and 66. The payroll summaries are calculations based on the data from the Astea and ADP records. Any miscalculations or errors in the payroll summaries do not necessarily equate to error in the underlying data or records. There was no evidence presented indicating Mitsui took any steps to verify the underlying data from the Astea records.