

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2026

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Clerk of the
Appellate Courts

**TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA v.
GILLEY CONSTRUCTION, INC.**

**Appeal from the Circuit Court for Coffee County
No. 2021-CV-47240 Robert Thomas Carter, Judge**

No. M2025-00026-COA-R3-CV

This case concerns the interpretation of an assigned risk workers' compensation insurance policy. The trial court construed the contract to give the insurer the authority to determine the meaning of the NCCI classification code provision at issue and granted summary judgment in favor of the insurer. We have determined that the trial court erred in its interpretation of the pertinent code provision and, therefore, we reverse and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the Court, in which W. NEAL MCBRAYER and JEFFREY USMAN, JJ., joined.

James D. Lane, Tullahoma, Tennessee, and Sam David Knight and Grant E. Reese, Birmingham, Alabama, for the appellant, Gilley Construction, Inc.

Benjamin Micah Rose, Brentwood, Tennessee, for the appellee, Travelers Property Casualty Company of America.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Gilley Construction, Inc. ("Gilley") is a Tennessee corporation headquartered in Manchester, Tennessee. The primary construction job at issue in this dispute was part of the State of Alabama's reconstruction of Interstate 59/20 through downtown Birmingham. Gilley entered into a subcontract with the prime contractor concerning the installation of steel reinforcement for interstate bridges.

Under Tennessee law, Gilley was required to maintain workers' compensation insurance for its employees or meet the statutory requirements for self-insurance. Tenn. Code Ann. § 50-6-405(a). Gilley purchased a workers' compensation insurance policy from Travelers Property Casualty Company of America ("Travelers") for the period from July 27, 2018, through July 27, 2019 ("Policy 1"). Travelers also issued a subsequent policy to Gilley covering the period from July 27, 2019, through July 27, 2020 ("Policy 2").¹

The policies at issue here are assigned risk policies obtained by Gilley through Tennessee's Workers' Compensation Insurance Plan ("the WCIP"). The Commissioner of Commerce and Insurance approves assigned risk plans, which provide insurance to employers unable to obtain coverage on the voluntary market. The assigned risk program in Tennessee is administered by the National Council for Compensation Insurance ("the NCCI"), a rating organization that promulgates rules, classifications, and rating plans for workers' compensation insurance. *See Am. Zurich Ins. Co. v. MVT Servs., Inc.*, No. M2011-01266-COA-R3-CV, 2012 WL 3064650, at *2 (Tenn. Ct. App. July 27, 2012). The NCCI assigned Travelers to write the workers' compensation policies for Gilley.

At the beginning of the coverage period for each policy, Gilley paid the estimated premiums requested by Travelers—\$115,104.68 for Policy 1 and \$56,990.72 for Policy 2. As will be discussed more fully below, the policies provide that the initial premiums are subject to change based upon a post-policy audit and that the insured is required to pay the final premium amount. Travelers conducted an audit after Policy 1 ended and determined that the proper NCCI classification code was 5222 rather than code 5213, which had been used initially. This reclassification resulted in an increase of \$735,366.60 in the premiums due from Gilley under the two policies. Gilley disputed the audit results, and Travelers initiated an audit dispute process. At the end of the audit dispute process, Travelers continued to request the increased premium amounts, which Gilley did not pay.

In February 2021, Travelers filed suit against Gilley for breach of contract or, in the alternative, to collect a debt on an open account. Gilley answered the complaint, admitting that "there may be an amount due and owing" under the policies but denying the sums alleged to be owed. Travelers filed a motion for partial summary judgment on its breach of contract claim. In March 2022, the court entered an agreed order providing that Travelers was entitled to partial summary judgment on the sole issue that, as regards the alleged breach of contract, "there is no dispute from Gilley regarding the fact that payments to Travelers were not made and that the issue of the Breach of Contract is not disputed." All other issues, including the amount due and the categories used by Travelers to calculate the amount due, remained in dispute.

Travelers made a second motion for partial summary judgment in July 2023 on the appropriate NCCI classification code to assess Travelers's risk associated with the work

¹ Policy 2 was canceled before the end of the policy period.

performed by Gilley. In support of this motion, Travelers submitted Gilley's subcontract agreement, photographs of the Birmingham bridge project, materials from the Scopes manual² on the two NCCI classification codes at issue, and an NCCI rule on classification assignment. Gilley responded in opposition to Travelers's motion and submitted the following: photographs of the work site; videos prepared by the prime contractor; emails between Travelers and Gilley; affidavits of Robert Gilley, Shonta Gilley, and James Jones; and a response to Travelers's statement of undisputed material facts.

The email communications between Travelers and Gilley include the following:

- 10/8/2019: Connie McCalla (Travelers premium auditor) to LaToya Pierce (Travelers account manager underwriter) stating that she met with Gilley employees the previous week for the audit and providing "a narrative of what transpired with this company in the past couple of years," which included an internal dispute between the company owner and her daughter/corporate officer/employee that culminated in the daughter leaving the company and the mother filing a lawsuit against her over alleged payroll improprieties.
- 10/15/2019: Ms. Pierce to Shawn Curreri (Travelers CFE, residual markets division) referring account to open a file "based on the information that was presented to the auditor after my initial inquiries."
- 11/25/2019: Ms. Pierce to Mr. Curreri stating that "a dispute may be forthcoming" based upon correspondence from Gilley.
- 12/13/2019: Shonta Gilley to Travelers audit dispute. Forwarding email from Vicki Gilley (President of Gilley) with attached color-coded "interpretation" of the 2018-2019 audit. Vicki states that the attachments are from their QuickBooks program, which "also provides all our Certified WH-347 forms we send out daily." She states that Gilley is disputing the audit.
- 12/20/2019: Autumn Beatty (Travelers dispute resolution specialist) to Ms. Pierce. Stating she was working with insured to resolve dispute but insured says "they are pending cancellation for 12/24." "Will a rescind be issued?"
- 12/23/2019: 9:34 a.m. Ms. Pierce to Ms. Beatty. Flagging that "the rescind should feed tomorrow." Also noting that the account had been sent to special investigations a few months earlier based upon "a situation that was reported to our auditor" and "some conflicting information" and advising to let Mr. Curreri know if "anything appears out of the ordinary with regards to the paperwork" on the dispute.
- 12/23/2019: 9:38 a.m. Ms. Beatty to Ms. Pierce. "The payroll is in line with the audit." "Is there an issue with class because it appears the main issue is the allocation of wages between building work and bridges. The majority was placed under the

² The two NCCI publications referenced by the parties are *Basic Manual of Workers' Compensation Insurance* ("the Basic Manual") and *Scopes of Basic Manual Classifications* ("the Scopes Manual"), which are specialized industry publications. This Court is limited to the excerpts provided by the parties and the available legal interpretations of the publications.

bridges class. Where it appears per the reports and per my conversation with the insured the majority of the work is with buildings.”

- 12/23/2019: 10:44 a.m. Mr. Curreri to Ms. Pierce and Ms. Beatty agreeing that “the major difference is the allocation of payroll between building work and bridges.” Curreri recommended obtaining copies of “all job contracts and certified payroll records (Form WH-347’s) for the policy period.” Noted that Gilley had a subcontract on the “bridge project at I-59/20” and that “the insured seems to have that coded blue for building work.”
- 1/14/2020: 8:55 a.m. Ms. Beatty to Ms. Pierce. “The insured is working on getting the job contracts that I requested per Shawn’s request. However the insured indicated it is over 7000 pages of documents so they are working on getting them over but it is taking time.”
- 1/14/2020: 9:47 a.m. Ms. Pierce to Ms. Beatty inquiring if she has heard back from the insured on emails dated 1/6/20 and 1/10/20. She stated that 30 days would have passed [presumably, from the initiation of the audit dispute] the following day and, if the insured had not responded, they would be “closing the dispute out with no change at this time if Shawn agrees.” Ms. Pierce also stated: “The insured has been aware since last November that these are the types of records (contracts, certified payroll records, etc.) that are required not only from their calls to the audit department but also from outgoing calls that I made.”

The affidavit of Robert Gilley, an officer and director of Gilley, states that he was present “on multiple occasions, at the location where Gilley performed all of its work [on the subcontract] at an off-site casting yard that was 3 to 5 miles away” from the I-20/59 bridge site. He provided further context regarding the photographs and videos provided by Gilley. In the affidavit of Shonta Gilley, Gilley’s secretary/treasurer, she explained that her duties were “paying bills, bookkeeping including accounts receivable and accounts payable, profit and loss statements and payroll summaries.” Having reviewed Gilley’s records, Shonta stated that, after she forwarded the audit dispute email from Vicki to Travelers, the company did not receive a response to the audit dispute. James Jones, the primary insurance agent who helped Gilley obtain the Travelers workers’ compensation policies at issue, described the audit dispute initiated by Gilley and Gilley’s efforts to provide materials to Travelers. He stated that, based upon his review of the documents concerning the work performed by Gilley employees at the off-site casting yard, the use of Code 5222 was not appropriate because Gilley’s employees “were never on a bridge or bridge decking” and that the project should have been rated under Code 5213.

In its response to Travelers’s statement of undisputed material facts, Gilley provided the following additional information regarding Gilley’s work under the subcontract:

3. The Scope of Work for Gilley contained in Exhibit A to the Contract provides that Gilley was responsible to “Install Steel Reinforcement.”

RESPONSE: Exhibit A to the Contract, entitled “Scope of Work and Supplemental Terms and Conditions” identified Gilley as a Subcontractor and references, as part of the scope of work, “Install Steel Reinforcement.” Exhibit A also includes a heading of “Supplemental Terms and Conditions” specifying the job that Gilley was to perform on behalf of the primary contractor including furnishing tie wire and the necessary tools for rigging and tying racks/horses. Templates for column and wall dowels, unloading, hoisting and setting prefabricated cages and other jobs specific to the portion of the job assigned to Gilley.

In its reply to Gilley’s response and supporting materials, Travelers submitted additional emails:

- 1/6/2020: 12:03 p.m. Ms. Beatty to Robert Gilley. Requesting additional documentation: “copies of all job contracts and certified payroll records (Form WH-347’s) for the policy period.”
- 1/6/2020: 1:48 p.m. Robert Gilley to Ms. Beatty. “I will get on this ASAP however I’m not sure how to do this as it will be hard to copy roughly 3000 pages but we may can look at a Dropbox and I can send digital/note some of these jobs didn’t require a WH347 “certified payroll” but the [sic] can be generated from QuickBooks.”
- 1/10/2020: Ms. Beatty to Robert Gilley checking “the status of the additional information needed. Please advise.”
- 1/13/2020: Robert Gilley to Ms. Beatty. “We are in the process its just looking like 7000 pages.” Says they were not expecting to have to provide this information and needed to “scrub sensitive employee info from these reports.”
- 1/23/2020: 4:41 p.m. Ms. Beatty to Robert Gilley stating that, “At this time I have to close the dispute file no change. Once you are able to provide the requested information the audit can be placed back into dispute status.”
- 1/23/2020: 8:15 p.m. Robert Gilley to Ms. Beatty. “Whoa, we have got to keep this going! This is unorthodox materials that will not help prove or disprove but we haven’t said we wouldn’t or couldn’t do this.” States they are working on the request and asked her to “please advise if all is ok with current policy staying in place or if this will affect the status!”

After a hearing in September 2023, the trial court denied Travelers’s motion because, based upon the proof submitted, the court could not determine as a matter of law which of the two competing NCCI classification codes should apply. Contrary to Travelers’s position, the trial court found that there was sufficient evidence that “Gilley did attempt to correct the code assignment at the close of the audit.” The court also rejected Travelers’s argument that Gilley was required to exhaust its administrative remedies by appealing to the Commissioner of Insurance.

In June 2024, Travelers filed a third motion for summary judgment asserting that, based upon the additional information obtained through discovery and Gilley's failure to exhaust its administrative remedies, Travelers was entitled to judgment as a matter of law. In support of its motion, Travelers relied upon the documents filed with its two previous summary judgment motions as well as the affidavit of Shawn Curreri (with an attached statement of account) and the depositions of Robert and Shonta Gilley.

On July 23, 2024, the trial court entered an order granting summary judgment to Travelers. The court found the following undisputed material facts:

1. Gilley applied for and was issued a TWIC policy for the 2018-2019 coverage period.
2. Gilley agreed to be bound by the terms of [the] policy and NCCI protocol which obligated Gilley to produce certain evidence in the event of a risk/premium audit.
3. Gilley was audited at the end of the coverage period.
4. During the audit Gilley did not turn over US Dept of Labor WHL 347 [sic] forms or individual daily work logs.
5. These forms would be best evidence of the actual risk exposure of the workers.
6. Gilley was advised of its administrative appeal rights.
7. Gilley did not appeal the audit findings to the Tennessee Workers['] Compensations [sic] Appeals Board.

The court then concluded that "Travelers made a reasonable premium calculation based on the information available at the audit." Judgment was entered against Gilley in the amount of \$732,101.60.

Gilley filed a motion to alter or amend the judgment, which the court denied in an order entered on December 5, 2024. This appeal followed.

We restate the issues raised by Gilley on appeal as follows: (1) Whether the trial court erred in placing the burden of proof on Gilley, the non-movant, to show that Travelers was not entitled to collect additional workers' compensation premiums; (2) whether the trial court erred in granting summary judgment to Travelers based, at least in part, upon Gilley's failure to exhaust administrative remedies; (3) whether the trial court erred in granting summary judgment to Travelers based, in part, upon Gilley's failure to provide Travelers with WH-347 forms; and (4) whether the trial court erred in its determination that NCCI code 5222 was the appropriate NCCI classification code to use to determine Gilley's premium for the employees at issue. Travelers makes the additional argument that Gilley waived its arguments in opposition to the third motion for summary judgment.

STANDARD OF REVIEW

We review a trial court's summary judgment determination de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). This means that "we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.* We "must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *see also Acute Care Holdings, LLC v. Houston Cnty.*, No. M2018-01534-COA-R3-CV, 2019 WL 2337434, at *4 (Tenn. Ct. App. June 3, 2019).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. When a party moves for summary judgment but does not have the burden of proof at trial, the moving party must either submit evidence "affirmatively negating an essential element of the nonmoving party's claim" or "demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264. "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

Once the moving party has satisfied its burden, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading." *Rye*, 477 S.W.3d at 265 (quoting TENN. R. CIV. P. 56.06). Rather, the nonmoving party must respond and produce affidavits, depositions, responses to interrogatories, or other discovery that "set forth specific facts showing that there is a genuine issue for trial." TENN. R. CIV. P. 56.06; *see also Rye*, 477 S.W.3d at 265. If the nonmoving party fails to respond in this way, "summary judgment, if appropriate, shall be entered against the [nonmoving] party." TENN. R. CIV. P. 56.06. If the moving party fails to show he or she is entitled to summary judgment, however, "the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008) (quoting *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998)).

The interpretation of an insurance policy, which is a contract, presents a question of law, which is subject to de novo review, with no presumption of correctness. *Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012); *Clifton v. Tenn. Farmers Mut. Ins. Co.*, 638 S.W.3d 664, 671 (Tenn. Ct. App. 2021).

ANALYSIS

We must determine whether the trial court erred in granting summary judgment in favor of Travelers in this case. The issues presented relate to the burden of proof, exhaustion of administrative remedies, Gilley's failure to provide requested information, and the appropriate NCCI classification code.³ For the reasons discussed below, we have concluded that the trial court erred in granting summary judgment to Travelers.

I. Burden of proof on summary judgment

Gilley asserts that the trial court erred by placing the burden upon the insured to establish that it was not required to pay additional premiums in this dispute over the correct NCCI classification code. Travelers asserts that the trial court employed the proper burden of proof for summary judgment "consistent with the unique type of workers['] compensation policy at issue here."

In its arguments in favor of summary judgment to the trial court, Travelers explained its position:

In this unique workers compensation insurance dispute, the burden of proof is particularly important, separate and apart from the aforementioned summary judgment standards. Simply stated, Gilley has the burden of proof to establish summary judgment should be denied to Travelers. This is because, as stated by the Tennessee Court of Appeals in *American Zurich Insurance Company v. MVT Services, Inc.*, 2012 WL 3064650 (Tenn. Ct. App. July 27, 2012) at *11, regarding individual worker risk: "When disputes arise, given that the purposes of the Workers' Compensation Law is to provide a reliable remedy to injured workers, **the burden is on the insured employer to establish that its workers should be excluded from premium consideration.**" (emphasis added)

Moreover, Gilley should have done so as part of the audit process, not belatedly after it was sued here. **In the course of such a retrospective audit,** the burden is on [the insured] to establish exclusion from premium

³ Travelers asserts that Gilley waived all of its arguments in opposition to the third motion for summary judgment because "there is no response in opposition to the third motion for summary judgment in the record." Travelers is correct that the record on appeal does not contain Gilley's response to the motion for summary judgment at issue. Gilley had an obligation to ensure that the record on appeal contained all relevant documents, including its response to the motion at issue on appeal. *See* TENN. R. APP. P. 24(a). The transcript of the hearing on the motion for summary judgment, which is part of the appellate record, reflects that Gilley did, in fact, submit a response to the motion for summary judgment in the trial court, and Travelers does not assert to the contrary. We decline to consider Gilley's arguments on appeal waived based solely upon this omission from the appellate record.

consideration.” *MVT Services, Inc.*, 2012 WL 3064650, at *17. (emphasis added). The court continued, “In a retrospective premium audit, the issue is not whether the worker would have certainly been covered had he filed a claim on the insurance policy; rather, the audit is an after-the-fact analysis designed ‘to examine the actual risk which [the insurance company] undertook during the policy period.’” *Id.* at *12 (quoting *Royal Insurance Company v. R & R Drywall, Inc.*, 2003 WL 21302983, at *4 (Tenn. Ct. App. June 6, 2003)). (emphasis added).

...

This is admittedly a very high burden for Gilley to satisfy, even on summary judgment as proposed by Travelers. As the appellate court [in] *MVT* opined, “[U]nder the terms of the [policy], [the insured] need only show that it ‘could’ be liable for workers’ compensation benefits for the disputed employees. Moreover, as we have emphasized, ‘the burden ordinarily falls on the insured . . . to establish’ that the disputed ‘should be excluded from premium consideration.’” *Id.* (quoting *Couch on Ins.* 3d § 69:15)

The trial court adopted the framework suggested by Travelers, stating that, under the policy and caselaw, it was “incumbent on Gilley to prove its employees should be excluded from the policy and by extension that a lower risk code should apply to its employees.”

Travelers relies heavily on this Court’s decision in *American Zurich Insurance Co. v. MVT Services, Inc.*, No. M2011-01266-COA-R3-CV, 2012 WL 3064650 (Tenn. Ct. App. July 27, 2012). Therefore, we will examine that case in detail. *American Zurich* involved a trucking company, Mesilla Valley Transportation (“MVT”), headquartered in Texas with a business location in Tennessee. *Id.* at *1. At its Tennessee business, MVT “employed as many as 143 over-the-road drivers who resided in Tennessee.” *Id.* MVT purchased an assigned risk workers’ compensation policy from American Zurich Insurance Company (“Zurich”), a policy administered by the NCCI. *Id.* at *2. The policy provided for retrospective rating for the calculation of insurance premiums, which this Court has described as follows:

This method of insurance premium calculation bases the premium on the total payroll of covered employees during the policy period. It is typically used where the exact composition of the employer’s workforce is subject to substantial variation, or where the insured’s risk is difficult to measure at the beginning of the policy period. *See* Lee R. Russ & Thomas F. Segalla, 5 *Couch on Ins.* 3d § 69:15 (2008). Under the retrospective rating method, the employer deposits an estimated premium with the insurance company at the beginning of the policy period. Shortly after the policy period expires, the insurance company conducts a routine retrospective premium audit, looking back at the workers who were actually on the insured’s payroll during the policy period, utilizing records provided by the insured employer related to

employee payroll and classification. The actual insurance premium due for the immediate past policy period is then determined based on the results of the audit. Depending on the audit result, the insured employer may either receive a refund on the premium paid or be required to pay additional premiums to the insurance company.

Id. (footnote omitted). The policy required MVT “to produce to Zurich Insurance payroll records and any other records for work that was completed during the policy period for all of its employees and subcontractors for use in the insurance company’s retrospective premium audit,” and “MVT was required under the policy to pay insurance premiums for all employees and workers who may have placed Zurich Insurance at risk of loss during the audited policy period.” *Id.* at *3.

While maintaining the Zurich policy for Tennessee employees, MVT created an alternative program for its Texas employees. *Id.* Unlike in Tennessee, Texas law did not require companies to maintain workers’ compensation for their employees. *Id.* So, MVT created an occupational benefit plan (“OB plan”), a company-sponsored and less expensive avenue for Texas employees to recover for on-the-job injuries. *Id.* Once the OB plan was established, MVT “did not pay premiums to Zurich Insurance for its Tennessee-resident over-the-road drivers, taking the position that those employees were actually Texas employees who were covered under the Texas OB Plan.” *Id.* MVT notified Zurich of its reclassification of these workers and ceased making premium payments to Zurich. *Id.* at *4.

As required by its policies, Zurich conducted audits after each policy period ended. *Id.* In May 2005, Zurich discovered that MVT had not paid premiums for twenty workers who had filed claims. *Id.* At that point, the insurance company instituted a specific policy that it would no longer accept claims for MVT’s Tennessee-resident drivers. *Id.* The insurer was concerned about its risk exposure for those employees and investigated further. *Id.* The NCCI guidelines, as found in the NCCI Scopes Manual, provided that, in the absence of information from the insured concerning a driver’s base terminal or the location where the driver spent the majority of their driving time, the employees should be assigned according to their state of residence. *Id.* at *5. Zurich conducted another audit of the policy period that ended in March 2006 and a subsequent policy period that ended in June 2006 (when Zurich canceled the policy due to nonpayment) and determined that, under the NCCI guidelines, MVT owed \$328,341 in retrospective premiums, which MVT refused to pay. *Id.* at *6.

Zurich filed suit against MVT in March 2008 seeking the retrospective premiums. *Id.* at *7. After discovery, the insurance company filed a motion for summary judgment on its complaint, asserting that “the undisputed facts established that MVT was responsible under the Zurich Policy for paying workers’ compensation insurance premiums for its Tennessee-resident over-the-road drivers, because those employees presented a risk of loss

to Zurich Insurance under the insurance policy.” *Id.* The trial court granted Zurich’s motion for summary judgment.⁴ *Id.* at *9.

On appeal, “MVT’s primary argument [was] that the employment status of the disputed Tennessee-resident over-the-road drivers must be determined on a case-by-case basis for each driver, because the circumstances for each are different.” *Id.* at *10. Zurich argued that, “for insurance policies that provide for retrospective premiums, the burden is on the insured to establish that an employee should be excluded from the premium calculation.” *Id.* Zurich emphasized that its policy “covered employees who presented an arguable workers’ compensation risk” and that, on that basis, its calculation of retrospective premiums was correct. *Id.* This Court explained that retrospective rating provisions “are based on the reality that ‘any number of employees may be hired or terminated while the policy is in effect, thus increasing or decreasing the amount of risk to which the insurer is exposed.’” *Id.* at *11 (quoting *CNA (Cont’l Cas.) v. King*, No. M2004-02911-COA-R3-CV, 2006 WL 2792159, at *6 (Tenn. Ct. App. Sept. 28, 2006)). We stated that the retrospective audit process “requires cooperation between the insurance company and the insured employer” to calculate the premiums:

When disputes arise, given that the purpose of the Workers’ Compensation Law is to provide a reliable remedy for injured workers, the burden is on the insured employer to establish that its workers should be excluded from premium consideration. One commentator has explained:

In most retrospective rate situations, the insured is required to provide the insurer with various documentation. If the information is incorrect, the insured runs the risk of having the insurance cancelled.

Disputes may arise between the parties over the particular factors employed in calculating the retrospective rate. For example, the parties may disagree about the actual number of employees of the insured, whether particular goods were excluded from coverage, and whether the insurer lost the right to claim a particular loss item. Should one or more of these factors be called into question, the burden ordinarily falls on the insured, who usually has custody of the relevant information, to establish that it should be excluded from premium consideration.

5 *Couch on Ins.3d, supra*, § 69:15 (footnotes omitted). In a retrospective premium audit, the issue is not whether the worker would have certainly been

⁴ The trial court also granted summary judgment in Zurich’s favor on a counterclaim filed against it by MVT.

covered had he filed a claim on the insurance policy; rather, the audit is an after-the-fact analysis designed “to examine the actual risk which [the insurance company] undertook during the policy period.” *Royal Ins. Co. v. R & R Drywall, Inc.*, No. M2002-00791-COA-R3-CV, 2003 WL 21302983, at *4 (Tenn. Ct. App. June 6, 2003) (quoting the trial court decision).

Id. at *11-12.

The opinion then examined the relevant caselaw, which addressed retrospective premium demands based upon an insured’s employment of subcontractors who were not included in the original calculation of the insured’s premiums. *Id.* at *12-14. The two key cases emphasized that, “where the insurance company was exposed to the risk of defending a workers’ compensation lawsuit filed by a worker, even if only to litigate the worker’s status, the assessment of retroactive premiums was warranted under the insurance contract.” *Id.* at *14 (citing *Hartford Underwriters Ins. Co. v. Penney*, No. E2009-01330-COA-R3-CV, 2010 WL 2432058, at *5 (Tenn. Ct. App. June 17, 2010); *King*, 2006 WL 2792159, at *7-8).

This Court then turned to the contractual dispute before it, noting that the insurance policy included a provision that the premium would include payroll for the services of MVT employees and “[a]ll other persons engaged in work that could make us liable” for workers’ compensation benefits. *Id.* at *15. The issue was whether the company “‘could’ have been liable for workers’ compensation benefits for the Tennessee-resident over-the-road drivers.” *Id.* We examined the other relevant policy provisions, which required MVT to “keep records of information needed to compute premium,” to “provide [Zurich] with copies of those records when [it] ask[s] for them,” and to “let [Zurich] examine and audit all [of MVT’s] records that relate to this policy.” *Id.* Thus, MVT was required to keep and provide Zurich with pertinent records to allow Zurich to determine the final premium “based on the records provided to it by MVT.” *Id.* We stated that: “If Zurich Insurance uses methodology to determine the premium that is congruent with the policy and consistent with the records and information furnished by MVT, it has complied with its contractual obligation. If so, MVT owes the premium assessed.” *Id.*

In addressing MVT’s argument that the employment status of each driver must be determined individually, this Court focused upon whether Zurich met its contractual obligation “to audit the information and records furnished by MVT and determine the retrospective premium.” *Id.* at *17. We reasoned that “[i]f MVT gave Zurich Insurance no indication in the audit that it felt that certain of the over-the-road drivers presented less risk to the insurance carrier than others, it cannot, in the ensuing litigation, ask the trial court to conduct a mini-trial on the circumstances of each individual driver.” *Id.* In the end, the Court concluded:

Given the records and information produced by MVT in the retrospective premium audit, Zurich Insurance had little choice but to conclude that it “could” be liable to MVT’s Tennessee-resident over-the-road drivers. It is undisputed that all of the Tennessee-resident over-the-road drivers lived in Tennessee, and that their employment was necessitated by MVT’s establishment of a terminal in Tennessee to service its growing Tennessee client base. It is also undisputed that, for all of these employees, at least some of their work was performed in Tennessee. The lack of driving logs left Zurich Insurance with almost no information regarding the state in which these drivers spent the majority of their time.

Id. Under these facts, Zurich was “at risk of being required to defend MVT against a claim filed by one of MVT’s Tennessee-resident over-the-road drivers, even if only to litigate the matter of coverage.” *Id.* at *18.

In the present case, Travelers attempts to take some of the statements from *MVT Services* out of context and apply them to the present case. Respectfully, we find that the facts in the present case differ significantly from those in *MVT Services*. Here, the dispute is not over which workers are covered by the policy but over the applicable NCCI classification code. In *MVT Services*, one of the key provisions of the policy required coverage for any worker who might put Zurich at risk of having to defend a lawsuit. In the present case, such a provision does not come into play because the dispute is not over which workers are covered. Moreover, in *MVT Services*, the insurance company was guided by a specific provision in the Scopes manual providing a presumption for how to classify an employee in the absence of other information.

As in *MVT Services*, we will analyze this case as a claim for breach of contract to determine if each party has acted in accordance with the contract terms and will apply the summary judgment burdens applicable under Tenn. R. Civ. P. 56. We decline to adopt Travelers’ position that, at the summary judgment level, the burden was on Gilley to prove Travelers was not entitled to summary judgment.

II. Exhaustion of administrative remedies

There is no dispute that Gilley did not exercise its right to pursue an administrative appeal of the audit findings at issue. Gilley asserts that it was not required to exhaust its administrative remedies and that, therefore, the trial court erred in granting summary judgment.

The applicable statute is Tenn. Code Ann. § 56-5-109(b), which states, in pertinent part:

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.

(Emphasis added). As Gilley emphasizes, the statute states that the insured “may” be heard pursuant to the reasonable means provided by the insurer and rate service organization. This Court has previously cited the permissive statutory language as indicating that an appeal is not mandatory. *Cook’s Roofing, Inc. v. Hartford Underwriters Ins. Co.*, No. W2019-00271-COA-R3-CV, 2020 WL 4151216, at *10 (Tenn. Ct. App. July 20, 2020) (concluding that the insured’s failure to pursue an administrative appeal did not deprive the trial court of subject matter jurisdiction). Travelers acknowledges that the language of the statute is permissive rather than mandatory, but cites caselaw to the effect that, “in the absence of a legal mandate, ‘the exhaustion of the administrative remedies doctrine is a matter of judicial discretion’ and subject to review under an abuse of discretion standard.” *Parents’ Choice Tenn. v. Golden*, No. M2022-01719-COA-R3-CV, 2024 WL 1670663, at *14 (Tenn. Ct. App. Apr. 18, 2024) (quoting *Ready Mix, USA, LLC v. Jefferson Cnty.*, 380 S.W.3d 52, 64 (Tenn. 2012)).

In *Ready Mix, USA, LLC v. Jefferson County*, 380 S.W.3d at 55, our Supreme Court considered whether the exhaustion of administrative remedies was required in a zoning matter. The Court held that the trial court did not abuse its discretion in ruling that Ready Mix was not required to exhaust the administrative remedies. *Id.* In reaching its decision, the Court stated, in part:

When a statute provides for an administrative remedy, an aggrieved party must ordinarily exhaust the remedy before seeking to utilize the judicial process. *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn.1997); *Bracey v. Woods*, 571 S.W.2d 828, 829 (Tenn. 1978). In *Thomas*, this Court observed that the exhaustion of remedies doctrine allows an administrative body to “(1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review.” *Thomas*, 940 S.W.2d at 566. Nevertheless, unless the statute providing for an administrative remedy requires exhaustion “by its plain words,” an administrative appeal is not mandatory. *Id.*; *see also Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn. 1985). Absent a statutory mandate, the exhaustion of the administrative remedies doctrine is a matter of judicial discretion. *Thomas*, 940 S.W.2d at 566 n. 5; *Reeves*, 691 S.W.2d at 530; *State ex rel. Moore & Assocs., Inc. v. West*, 246 S.W.3d 569, 577 (Tenn. Ct. App. 2005). When the issue of exhaustion is discretionary, “[t]his Court will not conclude that a trial court has abused its discretion unless the trial court ‘applied

incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party.” *Bailey v. Blount Cnty. Bd. of Educ.*, 303 S.W.3d 216, 237 (Tenn. 2010) (quoting *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)). A factor for consideration is whether judicial review would “prematurely interrupt the administrative process.” *Moore*, 246 S.W.3d at 577-78.

Id. at 63-64. The Court reasoned that, “The applicability of the ordinance to the operations of the Company presented a question of law and, therefore, did not require the exhaustion of administrative remedies.” *Id.* at 65 (citing *Bracey*, 571 S.W.2d at 830. By contrast, in *State ex rel. Moore & Associates, Inc. v. West*, 246 S.W.3d 569, 579 (Tenn. Ct. App. 2005), this Court reached the opposite conclusion where the “challenge was to the zoning administrator’s denial of the certificate [of compliance with zoning laws]” and not to “the validity of the ordinance requiring the buffer or the applicability of that ordinance to its hotel.”

Although we find no Tennessee cases addressing the exhaustion of administrative remedies in the context of disputes regarding assigned risk policies, two federal district court cases have grappled with the issue. In *Valley Mechanical, Inc. v. BB & T Insurance Services, Inc.*, No. 1:13-CV-378, 2014 WL 2871475 (E.D. Tenn. June 24, 2014), the insured in *Valley Mechanical*, a manufacturer of metal equipment, asserted that its insurer under the assigned risk pool had misclassified its workers, resulting in inflated insurance premiums. *Id.* at *1. The lawsuit involved claims under the Georgia and Tennessee assigned risk programs, and the insured initiated an administrative appeal in Georgia. *Id.* Shortly thereafter, and having not initiated an administrative appeal in Tennessee, the insured filed a diversity suit in the federal district court in Tennessee. *Id.* at *2. The insurer sought dismissal for lack of subject matter jurisdiction based upon the insured’s failure to exhaust its administrative remedies in Georgia and Tennessee. *Id.* at *2-3. After determining that the Georgia statutory requirement for administrative appeal was mandatory, the court addressed the statutory requirement in Tennessee found in Tenn. Code Ann. § 56-5-309(b). *Id.* at *4. After reviewing some Tennessee caselaw, the court concluded, as we have, that the statute does not require an insured to exhaust its administrative remedies before filing suit. *Id.* at *7.

The court in *Valley Mechanical* then analyzed whether, as a matter of judicial discretion, it should require the insured to pursue its administrative remedies. *Id.* at *8. In addition to the general purposes listed by the Court in *Ready Mix* (and quoted above), the district court considered “specific reasons for a court to not require exhaustion,” including ““(1) when the administrative remedy would cause undue prejudice to the subsequent assertion of a claim in court; (2) when the administrative remedy would be inadequate because the agency does not appear empowered to grant effective relief; and (3) when the agency has been shown to be biased or has predetermined the issue.”” *Id.* (quoting *Pickard*

v. Tenn. Water Quality Control Bd., 424 S.W.3d 511, 523 (Tenn. 2013)). The district court reasoned as follows:

In the instant case, Valley does not contend participating in the Tennessee administrative process would cause undue prejudice to the subsequent assertion of a claim in court or that the agency is biased or has predetermined the issue. Nor does Valley argue that availing itself of administrative remedies would be futile or that the Commissioner cannot grant effective relief. Instead, Valley points out that litigating in this Court does not threaten to prematurely cut short any Tennessee administrative process because none has been initiated. In a similar vein, Valley asserts that allowing the case to proceed would not damage the ability of the administrative process to function efficiently or an agency to correct its own mistakes. *See Ready Mix*, 380 S.W.3d at 63. Valley also contends the case does not involve complex questions that require the expertise of administrative bodies steeped in relevant regulations and laws. *Id.*

Valley's arguments are mainly a product of its decision not to initiate the Tennessee administrative process for its claims relating to its Tennessee workers (despite initiating—and later trying to abort—the Georgia administrative process for its Georgia workers). While it is true that proceeding before this Court would not affect an ongoing administrative process in Tennessee, that is just one factor the Court considers. Valley points to no authority holding that absence of an ongoing administrative process means a court must refuse to exercise its discretion to require a party to exhaust administrative remedies before filing suit. And, as explained above, Valley has not demonstrated any of the other sound reasons for refusing to require exhaustion.

In fact, there are several good reasons for requiring Valley to exhaust the Tennessee administrative process first. Section 56-5-509 and its implementing regulations set up a detailed administrative process to address the precise subject matter of the present suit. The rules set forth specific administrative procedures for reviewing insurance rating classifications and remedying errors found through reimbursement of premiums. Additionally, the Tennessee Commissioner of Commerce and Insurance may impose civil penalties if wrongful behavior is found. The Court also notes that the need for agency expertise and uniformity in decision making further strengthens the argument for exhaustion.

Id. at *8-9. Based upon these principles, the district court decided that “the Court will require Valley to exhaust administrative remedies for its Tennessee workers before proceeding with a lawsuit in this Court.” *Id.* at *9. Relying on the *Valley Mechanical*

precedent, the district court reached the same result in *Riverport Insurance Co. v. Countrywide Payroll & HR Solutions, Inc.*, No. 3:15-cv-00297, 2017 WL 4274707, at *3-4 (E.D. Tenn. Sept. 26, 2017).

Having reviewed the applicable law, we now return to the present case. Did the trial court err in relying on the exhaustion of administrative remedies as a basis for granting summary judgment in favor of Travelers? Based upon the foregoing principles of law, the trial court had the discretion to dismiss Gilley's claims for failure to exhaust administrative remedies. However, the court was ruling upon a motion for summary judgment by Travelers and, while citing Gilley's failure to pursue an administrative remedy, did not dismiss the case on that basis. Rather, the trial court reasoned:

The procedures established by the NCCI policies set out in *MVT Services and International Nutrition* [*Travelers Indem. Co. v. International Nutrition, Inc.*, 734 N.W.2d 719 (Neb. 2007)]⁵ embody the legal concept that, because of the nature of the assigned risk policy, Gilley was contractually bound to pursue the administrative remedies set forth in the policy, and to appeal in accordance therewith if it was unsatisfied with the outcome. The protocol also recognizes that the audit process and the workers compensation appeal board would be a better forum to analyze what the proper risk codes should apply [sic] to the nature of work in the contract.

Thus, it appears that the trial court considered Gilley's failure to exhaust the available administrative remedies to constitute a breach of the insurance policies. There is no evidence submitted by Travelers, and Travelers does not argue on appeal, that the insurance policy required Gilley to file an administrative appeal.⁶ Rather, Travelers asserts that the trial court acted within its discretion "in granting summary judgment at least in part because the Appellant failed the exhaustion [sic] of its administrative remedies."

In its analysis regarding the exhaustion of administrative remedies, the trial court relied upon its understanding that Gilley's failure to pursue an administrative appeal breached the insurance policy, an understanding that is not supported by any evidence submitted by Travelers. Therefore, we must conclude that the trial court erred on this issue.

III. Failure to provide WH-347 forms

Gilley next assigns error to the trial court's reliance upon its failure to provide WH-347 forms, which it argues were not required under the terms of the policy. Travelers argues that, as a matter of contract law, Gilley agreed that its risk would be determined by

⁵ We will discuss *International Nutrition* in detail later in this opinion.

⁶ The appellate record does not contain a copy of the insurance policies at issue.

Travelers and that the trial court did not err in basing its decision in part upon Gilley's breaches of the policy terms, which Travelers asserts required Gilley to produce these forms.

As this Court stated in *MVT Services*, workers' compensation insurance policies are contracts, "subject to the traditional rules of contractual interpretation." 2012 WL 3064650, at *10. We seek to "ascertain the intention of the parties 'based on the ordinary meaning of the language contained within the four corners of the contract.'" *Id.* (quoting *84 Lumber Co. v. Smith*, 356 S.W.3d 380, 383 (Tenn. 2011)). In addition, we must interpret a workers' compensation insurance contract "in a manner that is consonant with Tennessee's workers' compensation laws." *Id.*

We begin by setting out the policy provisions⁷ at issue:

A. Our Manuals

All premiums for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain businesses or classifications. These classifications are assigned based on an estimate of the exposures you should have during the policy period. If your actual exposures are not properly described by these classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium of each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. All your officers and employees engaged in work covered by this policy; and
2. All other persons engaged in work that could make us liable under Part One (Workers' Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as a premium basis. This Paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers' compensation obligations.

⁷ The appellate record does not include the rest of the policies at issue.

D. Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers' compensation law is not valid.

E. Final Premium

The premium shown on the Information Page, schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications, and rates, that lawfully apply to the business and work covered by this policy. If the premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy

F. Records

You will keep records of information needed to compute the premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all of your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

Travelers generally asserts that Gilley breached all of the quoted provisions, but focuses its appellate argument on subsections (F) and (G), emphasizing that "it is undisputed that [Gilley] refused to produce the WH-347s at any time." Travelers argues that Gilley had a duty to produce "all of your records that relate to this policy." Gilley argues that the WH-347 forms were not required under the policy terms and that Travelers did not request the WH-347 forms until the audit dispute process. According to Gilley, these forms would not provide new information to that already provided to Travelers.

Under subsection (F), the insured must "keep records of information needed to compute the premium" and provide copies of those records to the insurer upon request. Subsection (G) provides that the insured will allow the insurer to conduct an audit of "all of your records that relate to this policy." Further, the policy states that the relevant records "include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data." Travelers states that

this list “obviously includes the requested WH-347s,” while Gilley takes the position that these forms “are not required to be used, maintained, or disclosed by the policy.”

The documents submitted in support of Travelers’ motions for summary judgment include a sample WH-347 form. The form originates from the Wage and Hour Division of the U.S. Department of Labor and requests payroll information, including hours worked and earnings. Use of the form is optional, but “covered contractors and subcontractors performing work on Federal or federally assisted construction contracts are required by the DBRA [Davis-Bacon and Related Acts] regulations and the contract clauses to submit payroll information on a weekly basis.” <http://www.dol.gov/agencies/whd/forms/wh347> (last visited June 30, 2026). The Department of Labor “and contracting agencies receiving this information review the information to help determine whether workers have received legally required wages and fringe benefits.” *Id.* Contrary to the characterization made by Travelers to the trial court, WH-347 is not a tax document.

Travelers relies upon statements made by Shonta Gilley during her deposition testimony to support its contention that Gilley failed to provide “important documents” that “would have revealed, *inter alia*, whether the Appellant’s workers ever ventured to the bridge portion” of the Birmingham project or “remained at the casting yard, which is where the Appellant claimed its performed most of the work at issue under the policies.” The relevant portion of her testimony is as follows:

Q. Okay. My question is about the time sheets. The individual time sheets for every worker, were they generated for this job?

A. I’ve developed that over the time. After 2020 is when I’ve developed those. . . .

Q. Let’s talk about this day.

A. This day, David Carr has boxes because this company wanted daily labor sheets. There should be daily labor sheets somewhere.

Q. Do you know if there are daily labor sheets?

A. I’m going to be quite honest with you. *I threw everything in a dadgum box and left it because I had enough to do.* He was specifically for this job and any of the surrounding jobs.

Q. Do you know if Gilley ever provided those, if they exist, those work daily sheets to Travelers?

A. I don’t know that they ever provided them to Travelers. I don’t know that it was ever asked for them.

Q. That’s not my question. My question is, did they ever provide the individual sheets to Travelers?

A. No.

Q. Would you agree with me that if Travelers had, based on your all’s theory, Gilley’s theory, if Travelers had those individual sheets, it would be

helpful for them to determine exactly what each individual laborer was doing on each individual day?

A. *It would be beneficial, yes.*^[8]

Q. And since we don't have those sheets, or at least that I'm aware of, we have to rely upon not the QuickBooks information, but these spreadsheets; right?

A. You can pull up the QuickBooks too.

Q. Well, did Gilley provide the QuickBooks to Travelers?

A. The lady was sitting across my desk. She was—I mean, in the audit, I gave her whatever she asked for.

Q. No, ma'am. My question is, did Gilley provide the QuickBooks printouts to the auditor?

A. Not to my knowledge.

(Statements emphasized by Travelers in its appellate brief in italics.) Contrary to Travelers' argument, we do not find this testimony to be undisputed evidence that Gilley refused to produce documents that would have been the best evidence of the location of its employees' work. Rather, Ms. Gilley's reference to the "dadgum box" may indicate, as asserted by Gilley, that she put documents in a box for the person in charge of responding to the audit.

As suggested by the questions posed by Travelers to Ms. Gilley at her deposition, Travelers takes the position that Gilley had an affirmative obligation to produce "all of your records that relate to this policy," regardless of whether Travelers asked for the documents. Further, Gilley argues that the obligation is to produce the relevant information at the time of the audit itself. However, the policy language states: "You will provide us with copies of these records when we ask for them." Gilley argues that it did not consider the WH-347 forms relevant and that it provided all of the information requested during the audit itself. Travelers requested the WH-347 forms during the audit dispute as a means of double-checking the accuracy of the information previously provided by Gilley. As reflected in the email evidence quoted above, and as Gilley asserted at oral argument, Gilley stated that it would attempt to provide the information, but Travelers ended the dispute process.⁹

⁸ In the fact section of its brief, Travelers concludes from this testimony that Ms. Gilley "agreed that the daily worksheets would be the best evidence to support the Appellant's claim regarding the 'actual risk' it incurred at the casting yard."

⁹ At oral argument, Gilley also stated that none of the records it provided to Travelers indicated that the relevant workers worked at the actual bridge site. According to Gilley, the photographs upon which Travelers relied were those representing the larger bridge project, not the site of the work performed by the employees at issue.

In arguing that Gilley’s failure to produce the WH-347 forms breached the policy, Travelers cites a Nebraska case, *Travelers Indemnity Co. v. International Nutrition*, 734 N.W.2d 719 (Neb. 2007).¹⁰ In that case, the primary issue was “whether Travelers had the authority to change International Nutrition’s classification code and retroactively apply the change.” *Id.* at 721-22. In our case, there is no dispute that Travelers has the authority to make retroactive premium changes in accordance with the NCCI guidelines. *International Nutrition* does not support Travelers’ suggestion that it alone had the authority to determine the premium or that Gilley breached the policy by failing to produce the WH-347 forms under the timeline of the audit and audit dispute in this case. (We will discuss *International Nutrition* in more detail in the next section of this opinion.)

In its findings of undisputed material facts, the trial court stated that, “*During the audit*, Gilley did not turn over US Dept of Labor WHL 347 [sic] forms or individual daily work logs.” (Emphasis added). We do not believe that Gilley was required to produce these forms until Travelers requested them, which did not occur until the audit dispute process. The trial court also found that it was undisputed that “These forms would be best evidence of the actual risk exposure of the workers.” This finding of fact is erroneous because Gilley did not consider the WH-347 forms to contain information not already provided and, contrary to Travelers’s assertion, Ms. Gilley did not agree that these documents would be the best evidence of the relevant information. The trial court erred in basing its grant of summary judgment on these erroneous findings.

IV. Issue of Appropriate NCCI classification code

The trial court concluded that “Travelers made a reasonable premium calculation based on the information available at the audit.” Gilley challenges this conclusion. Travelers asserts that its decision regarding the applicable NCCI classification code is not the real issue because Gilley agreed to give Travelers the authority to decide the appropriate code. Travelers further argues that, even if we accept the information provided by Gilley concerning the location of the employees’ work, the trial court did not err in accepting Travelers’ determination concerning the applicable NCCI classification code.

A. Travelers’ authority under the policy

Before addressing the appropriate NCCI classification code, Travelers describes the real issue to be as follows:

First, Appellant agreed as part of the Gilley Policies for the Appellee to make this determination [concerning the correct NCCI classification code]. Pellucidly, the issue is not which NCCI Classification Code reflects

¹⁰ Of course, cases from other states may be persuasive authorities, but they are not controlling authorities in this Court. *Clifton*, 638 S.W.3d at 677.

the “actual risk” undertaken in a given policy period, it is what the Appellant agreed to in the Gilley Policies. As the Nebraska Supreme Court found in *Travelers Indem. Co. v. Int’l Nutrition, Inc.*, 734 N.W.2d 719, 726-727 (Neb. 2007): “These provisions clearly and unambiguously gave Travelers the authority to retroactively change International Nutrition’s classification codes and increase the premium payments when the initial premium was based on what was later determined to be an incorrect classification code.” The same is true here in this case.

Travelers’ position is that, under the policy terms as interpreted in *International Nutrition*, Travelers makes the premium determination, including the classification code decision, and Gilley contractually agreed to accept that decision.

The portion of *International Nutrition* quoted by Travelers here appears in the court’s analysis of the insurer’s (Travelers’) argument that the insurance policy did not give Travelers the authority “to retroactively apply the change in classification code and increase the premiums.” *Id.* at 725. The insured in *International Nutrition* asserted that the policy provisions did not “expressly grant Travelers this authority and that the language in the policy on which the district court relied to support its conclusion is ambiguous and should have been construed against Travelers.” *Id.* at 725-26. The insured lost this argument. The court cited policy provisions containing essentially the same provisions on “Classifications,” “Final Premium,” and “Audit” as those (quoted above) applicable in the present case and, in that context, made the statement (relied upon by Travelers) that “[t]hese provisions clearly and unambiguously gave Travelers the authority to retroactively change International Nutrition’s classification codes and increase the premium payments when the initial premium was based on what was later determined to be an incorrect classification code.” *Id.* at 727.

Travelers cites *International Nutrition* to support its contention that Gilley “agreed as part of the Gilley Policies for [Travelers] to make this determination [concerning the NCCI classification code and resulting premium].” Travelers is actually going a step further, asking this Court to conclude that, at least at the summary judgment stage, it is too late for Gilley to contest the classification code Travelers decided to apply. While the assigned risk policy does give Travelers a great deal of authority, the insurance contract still requires a meaningful audit process. The court in *International Nutrition* recognized the insurance company’s authority to retroactively change a premium “when the initial premium was based on what was later determined to be an *incorrect classification code*.” 734 N.W.2d at 726-27 (emphasis added). Travelers had the duty to apply the proper classification code based upon the information obtained in the audit process. We reject Travelers’ assertion that Gilley is precluded from challenging the determination of the correct NCCI classification code.

A. NCCI code determination

The two competing NCCI classification codes at issue in this case are 5213 and 5222. The record includes information from the Scopes Manual regarding these classification codes.

Regarding NCCI classification code 5213, the Scopes Manual provides, in pertinent part:

PHRASEOLOGY CONCRETE CONSTRUCTION NOC

Note: Includes foundations or the making, setting up or taking down of forms, scaffolds, falsework or concrete distributing apparatus. Excavation, pile driving, all work in sewers, tunnels, subways, caissons or cofferdams to be separately rated. Codes 5222—Concrete Construction in Connection with Bridges and Culverts and 5506 and 5507—Street or Road Construction shall not be assigned at the same job or location to which Code 5213 applies.

Description:

Code 5213 applies to all commercial types of concrete building construction, self-bearing floors, foundations, piers, culverts, silos, grain elevators, etc., and includes making and erecting forms, placing reinforcing steel and stripping forms. Code 5213 applies to each of the aforementioned steps in the concrete construction process whether all work is performed by the principal contractor or portions of the job—such as making or erecting forms—are completed by a specialty subcontractor. The term “self-bearing floors” mentioned above is used as a basis for distinguishing between self-supported concrete floors, assignable to Code 5213, and ground-supported concrete floors, assignable to Code 5221. A self-bearing floor is elevated above the ground and, being an integral part of the concrete construction itself, is assigned to Code 5213. A ground-supported floor of a building that is poured either at the beginning or end of the construction job involves the type of concrete or cement work included in 5221.

Concrete walls that are poured in flat forms on ground level are assigned to Code 5221, provided that the pouring employer does not tilt up the walls and secure them into place. This operation is assigned to CODE 5221 since the exposure is the same as that of pouring a ground-supported concrete floor. Code 5213 is assigned to an operation in which an employer both pours the concrete at ground level to create a wall and subsequently tilts the wall into place.

...

Code 5213 is also assigned to concrete operations on commercial sites in connection with building raising or moving operations. When no separation of payrolls exists, the payroll for the entire building raising or moving operation must be assigned to Code 5703 or the highest rated classification that applies, whichever is greater.

...

Related Operations Not Classified to Code 5213

...

Certain Code 5213 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 5213 operations that are not assigned to Code 5213.

- 5222 Concrete Construction in Connection with Bridges or Culverts

The relevant provisions regarding NCCI classification code 5222 are as follows:

PHRASEOLOGY

CONCRETE CONSTRUCTION IN CONNECTION WITH BRIDGES OR CULVERTS

Applies only when clearance is more than 10 feet at any point or entire distance between terminal abutments exceeds 20 feet. Includes making, setting up or taking down forms, scaffolds, false work or concrete distributing apparatus; the mfg. of concrete piles at the job location; and the pouring of concrete into hollow steel piles. Excavation, pile driving, all work in tunnels, subways, caissons or cofferdams to be separately rated.

...

SCOPE

Code 5222 is applicable to concrete construction in connection with bridges or culverts. The bridge or culvert must qualify under either the specified “clearance” or “distance” as described in this classification’s footnote.

...

Per footnote phraseology in Codes 5213 and 5221, Code 5222 shall not be assigned to the same job or location to which either Code 5213—Concrete Construction NOC or Code 5221—Paving or Repaving is applicable.

Concrete pumping operations, whether performed by a general contractor, specialist contractor or concrete ready mix dealer, are assigned to the appropriate concrete construction class that is applicable to the location at which the concrete is being pumped.

In this case, as in *International Nutrition*, the “Our Manuals” subsection of the insurance policy states that premiums will be determined by “our manuals of rules, rates, rating plans and classifications.”¹¹ The Nebraska court concluded that “the ‘Our Manuals’ provision in Travelers’ policy incorporated the NCCI Basic Manual into the policy.” 734 N.W.2d at 727. In our case, Gilley does not dispute that the insurance policy incorporates the NCCI Scopes Manual and Basic Manual.

As previously stated, the insurance policy is a contract subject to the rules of contract interpretation, which include the following:

“A cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties.” *Allmand [v. Pavletic]*, 292 S.W.3d [618, 630 (Tenn. 2009)](citing *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006)). We initially determine the parties’ intent by examining the plain and ordinary meaning of the written words that are “contained within the four corners of the contract.” *84 Lumber Co. v. Smith*, 356 S.W.3d 380, 383 (Tenn. 2011) (citing *Kiser v. Wolfe*, 353 S.W.3d 741, 747 (Tenn. 2011)). The literal meaning of the contract language controls if the language is clear and unambiguous. *Allmand*, 292 S.W.3d at 630.

¹¹ The insured in *International Nutrition* argued that the trial court erred in “concluding that the clear and unambiguous language of the insurance policy allowed Travelers to rely on the NCCI Basic Manual.” 734 N.W.2d at 725. In rejecting the insured’s argument, the court stated:

The insurance policy issued by Travelers provided that all premiums for the policy will be determined by “our manuals of rules, rates, rating plans and classifications.” *International Nutrition* argues that this phrase is ambiguous and cannot be read to include the NCCI Basic Manual. *International Nutrition* contends that because the NCCI Basic Manual was not actually produced by Travelers, it cannot be considered one of “our manuals” under the plain language of the policy. We disagree.

International Nutrition’s argument ignores the context in which the term is used in the policy and the legal framework in which the assigned risk program operates. Travelers does not have the authority to create and apply its own classification codes, rates, filing date, or forms. Rather, Travelers is obligated to use those filed by the NCCI and approved by the state. Because of this requirement, the “our manuals” provision in the policy cannot be understood without reference to the NCCI publications. And in any event, the 120-day provision from the NCCI Basic Manual simply supplements the clear language of the policy with respect to estimated and final premiums.

Id. at 727.

Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 659 (Tenn. 2013).

Travelers and Gilley disagree on the correct application of these NCCI guidelines to the facts of this case. For purposes of our analysis here, we are assuming that all of the relevant Gilley employees performed their work at a casting yard several miles away from the actual highway overpass being constructed. Gilley's subcontract required it to "[i]nstall steel reinforcement." Gilley's employees did steel reinforcement or built "cages" by tying steel. According to Gilley, other subcontractors actually poured the concrete, lifted the posts up, put them on trucks, and transported them to the bridge site, where other subcontractors erected and installed the concrete posts into the bridge. In fact, Gilley asserts, the company decided to perform its work off site in order to reduce the risk to its workers by being away from the bridge.

Gilley argues that NCCI code 5222 does not apply because, according to the language in the Scopes Manual, that section "[a]ppplies only when clearance is more than 10 feet at any point or entire distance between terminal abutments exceeds 20 feet." Because its employees were not working on or near the bridge, Gilley argues, 5222 is not applicable. Gilley reasons that "Code 5222 is a higher risk code because it involves performing work on a bridge that 'is more than 10 feet . . . between the ground and the under portion of the bridge,'" and "[b]eing more than 10 feet above the ground obviously presents a greater risk of injury than working off-side and away from the actual bridge."

Travelers argues that code 5222 applies to "concrete construction in connection with bridges or culverts," and that the workers' distance from the bridge does not matter because their work is being performed "in connection" with a bridge construction project. Travelers also points to photographs provided to it by Gilley that, it states, "clearly demonstrate the clearance requirement involving the 'massive interstate bridge project' in Birmingham, Alabama, was met." In its response to Travelers' motion for summary judgment, Gilley explained that the pictures showing workers on a bridge overpass did not include its employees but were merely reflective of the larger project. Travelers also argues that NCCI code 5213 specifies that concrete construction in connection with bridges and culverts is not included.

So, the issue boils down to whether concrete construction performed at a site miles away from the actual bridge or overpass (and transported to the bridge site and installed in the bridge by other workers) is concrete construction "in connection with" a bridge. Under the heading CONCRETE CONSTRUCTION IN CONNECTION WITH BRIDGES OR CULVERTS, code 5222 specifies that this section "Applies only when clearance is more than 10 feet at any point or entire distance between terminal abutments exceeds 20 feet."¹²

¹² The next sentence explains that the section "Includes making, setting up or taking down forms, scaffolds, false work or concrete distributing apparatus; the mfg. of concrete piles *at the job location*; and

Reading these provisions together, we consider the statements following the heading “concrete construction in connection with bridges or culverts” as further defining the meaning of that term. Thus, code 5222 applies only to work where the clearance or distance between terminal abutments meets the stated requirements. As noted by the court in *International Nutrition*, “classification codes are intended to provide insurers with a categorical way of assessing the risks associated with providing workers’ compensation coverage to employers.” 734 N.W.2d at 730. The policy itself, in the “Classifications” provision, states: “These classifications were assigned based on an estimate of the exposures you should have during the policy period.” It stands to reason that the level of risk associated with working on or near a bridge structure would be greater than that associated with constructing steel cages or reinforcement in a separate area. We have determined that, under the undisputed facts, code 5222 would not apply to Gilley’s employees working at an off-site casting yard.

We conclude that the trial court erred deferring to Travelers’ interpretation of the contractual language and in granting summary judgment in favor of Travelers.

CONCLUSION

The judgment of the trial court is reversed, and the case is remanded for further proceedings. Costs of this appeal are assessed against the appellee, Travelers Property Casualty Company of America, for which execution may issue if necessary.

/s/ Andy D. Bennett
ANDY D. BENNETT, JUDGE

the pouring of concrete into hollow steel piles.” (Emphasis added). Gilley asserts that its employees did not perform any of the listed tasks.