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SECRETARY OF STATE

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

IN THE MATTER OF:	)	
	)	
TENNESSEE TECHNICAL CONSULTANTS	)	
	)	
and	)	
	)	
NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.	)	**Docket No. 12.28-111559A**
	)	**WC Appeal - Insurance**
and	)	
	)	
AMERICAN ZURICH INSURANCE COMPANY	)	
	)	
and	)	
	)	
AON RISK SERVICES CENTRAL, INC.	)	

FINAL ORDER

This matter was heard on November 14, 2011, before the Honorable Mattielyn Williams, Administrative Judge, assigned by the Secretary of State, with Marie Murphy, Assistant Commissioner for Policy of the Tennessee Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. Chlora Lindley-Myers was subsequently appointed the Commissioner's Designee and, as the Commissioner's Designee, Ms. Lindley-Myers makes the final determination as to the Findings of Fact and Conclusions of Law in this matter. Tennessee Technical Consultants ("TTC") was represented at the hearing by Daniel C. Todd of Todd, Floyd & Hammet, PLC. The National Council on Compensation Insurance, Inc. ("NCCI") was represented by W. Davidson Broemel of Burr & Forman LLP. AON Risk Services Central, Inc. ("AON") was represented by Tremain C. Mattress of Waller, Landsden,

Dortch & Davis, LLP. American Zurich Insurance Company did not appear at the hearing and was not represented by counsel.

JURISDICTION

The Commissioner of Commerce and Insurance (the "Commissioner") has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-309(b), which provides:

> Every insurer and rate service organization shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard on written request to review the manner in which the rating system has been applied in connection with the insurance afforded. If the insurer fails to grant or reject the request within thirty (30) days, the applicant may proceed in the same manner as if the application had been rejected. Any party affected by the action of the insurer on the request may, within thirty (30) days after written notice of the action, appeal to the commissioner who, after a hearing held upon not less than ten (10) days' written notice to the appellant and to the insurer, may affirm, modify, or reverse the action.

ISSUES

The subject of the hearing was whether NCCI correctly determined that Code 5183 (Plumbing NOC and Drivers) and Code 8227 (Construction or Erection Permanent Yard) should be assigned to TTC, and that Code 7515 (Oil or Gas Pipeline Operation and Drivers) should be deleted. After consideration of all testimony, exhibits and the entire record in this matter, it is determined that Code 7515 is the correct classification for TTC.

This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Billy R. Ennis, Jr. d/b/a Tennessee Technical Consultants ("TTC") is a sole proprietor which performs maintenance and repair work on gas distribution and transmission lines and in rights-of-way owned by Piedmont Natural Gas Company ("Piedmont") in Nashville, Davidson and surrounding counties. Work performed by TTC employees includes detection of

leaks in gas lines, repair or replacement of damaged gas lines, inspection and replacement of shut-off valves, and movement or extension of gas lines for new buildings.

2. The National Council on Compensation Insurance, Inc. ("NCCI") is a rate service organization within the meaning of Tenn. Code Ann. § 56-5-302(10) and is licensed as such by the Department of Commerce and Insurance under Tenn. Code Ann. § 56-5-310 to file forms, classifications, rates, and conduct surveys and inspections and other activities specified in the law.

3. NCCI has filed its B*asic Manual for Workers Compensation and Employers Liability Insurance* ("*Basic Manual*") approved for use in Tennessee by the Department of Commerce and Insurance for the purpose of determining workers' compensation classifications. NCCI also publishes the *Scopes® of Manual Classifications* ("*Scopes® Manual*") which describes and explains the classifications contained in the *Basic Manual.*

4. The Tennessee Workers Compensation Insurance Plan ("TWCIP") is an assigned risk workers' compensation insurance plan, the market of last resort for employers unable to obtain workers' compensation insurance coverage in the voluntary market. The Plan Administrator of the TWCIP is AON Risk Services Central, Inc.

5. American Zurich Insurance Company ("Zurich") is in the business of providing workers compensation insurance to employers in Tennessee and was the workers' compensation insurer of TTC through the TWCIP at all times relevant.

6. On January 7, 2010, Raymond Grabinski, ("Mr. Grabinski"), a Quality Assurance Specialist employed by NCCI, conducted a classification inspection of TTC.

7. NCCI issued an Inspection and Classification Report ("Inspection Report") dated January 20, 2010 based on Mr. Grabinski's inspection which concluded that the correct classification for the TTC workers' compensation policy should be Code 5183 (Plumbing NOC and Drivers) and Code 8227 (Construction or Erection Permanent Yard), and that Code 7515 (Oil

and Gas Pipeline Operation and Drivers) should be deleted. The Inspection Report stated that Code 5183 "best describes" TTC operations because it "applies to plumbing operations that install, remove, or repair equipment that is used to direct gas or water supplies to a destination."

8. There is no dispute among the parties to this matter with regard to the accuracy of the Description of Operations contained in the Inspection Report.

9. TTC, which is licensed as a municipal utility, detects and repairs leaks in natural gas distribution lines or "mains" which are usually not more than two inches in diameter, but occasionally may be up to six or more inches in diameter. TTC performs work on lines beginning up to a mile from the meter but performs no work between the gas meter and the business or residential customer, inside any house or other building. The lines on which TTC works are pressured down by a series of regulators that reduce the pressure from the transmission lines to the belt lines, and from the belt lines to the distribution lines. Finally, the distribution lines are pressured to distribution levels to service lines connected to homes or businesses.

10. TTC does not have a plumbing license, and is not licensed to do any work inside a building, such as hooking the gas line up to equipment and appliances.

11. No project on which TTC works involves a cost of $25,000 or more.

12. The *Basic Manual* states that Code 5183 (Plumbing NOC & Drivers) is "applicable to gas, steam, hot water, or other types of pipe fitting" and that it "[i]ncludes house connects and shop operation."

13. The *Scopes® Manual* phraseology for Code 5183 provides in pertinent part as follows:

> SCOPE: Code 5183 is applicable to plumbing operations provided that the work performed is not otherwise classified" (NOC). Insureds contemplated by Code 5183 may install, remove, or repair equipment that is used to direct gas or water supplies to a destination. This equipment includes but is not

limited to piping and related fixtures, appliances, and accessories. No limits have been established as to the size of the pipe being repaired or installed.

Shop work associated with plumbing operations is additionally assigned to Code 5183. Code 8227—Construction or Erection Permanent Yard is also available for a permanent yard maintained by a plumbing contractor. Refer to Code 8227 for information that distinguishes between shop and yard operations for classification purposes.

* * * *

14. The *Basic Manual* language for Code 7515 (Oil or Gas—Pipeline Operation & Drivers) simply notes that construction, operation of wells, or oil refining are to be separately rated.

15. The *Scopes® Manual* for Code 7515 provides in pertinent part as follows:

SCOPE: This classification covers the operation of "on stream" pipelines for the cross-country transmission of oil or gas. It includes the laying or relaying of gathering and distributing lines, the operation of pumping stations, line checking, meter reading, tine maintenance or repair and prevailing right-of-way clearance and operation of any telephone, telegraph or radio system pertaining thereto. Code 7515 also includes the operation of underground storage facilities for liquefied petroleum gas (L.P.G.), jet fuel, etc.

* * * *

16. Dan Hushion ("Mr. Husion"), a premium auditor employed by Employers Cost Solutions, testified on behalf of TTC and TTC's insurance agent, BB&T Insurance Services, that Code 7515 accurately described the operations of TTC. The Mr. Hushion stated that, "The "final destination of the oil or gas would be the burner inside the individual building or house." He further testified that Code 5183 was not appropriate because the *Scopes® Manual* phraseology for the classification described a number of plumbing activities in which TTC did not engage.

17. NCCI's Rules and Classification Manager, Maureen Longanacre ("Ms. Longanacre"), testified that, based on her review of the Inspection Report and knowledge of NCCI rules, Code 7515 would not be applicable to TTC, noting that terms used in the *Scopes® Manual* such as "on-stream" and "cross-country" indicated to her that the classification is applicable to "a

very large system needed to handle the gas needs in this country." Ms. Longanacre further testified that the Code 5183 classification is applicable to gas, steam, hot water, or other types of pipe-fitting, does not contain a licensure requirement, and refers to repairing equipment to direct gas or water supplies to a destination, activities in which TTC is involved.

18. AON concurs with the NCCI's determination that Code 5183 is the correct classification for TTC.

19. TTC did not participate in NCCI's dispute resolution process, since workers' compensation insurance coverage was provided through the TWCIP.

20. TTC timely filed an appeal with the Department of Commerce and Insurance on January 11, 2011.

CONCLUSIONS OF LAW

1. Pursuant to Tenn. Comp. R. and Regs. 1360-4-1-.02(7), the Petitioner, Tennessee Technical Consultants, bears the burden of proof in proving by a preponderance of the evidence that the facts alleged in the Petition are true and that the issues raised therein should be resolved in its favor.

2. Tenn. Code Ann. § 56-5-320 requires each insured to be a member of the designated rate service organization and to adhere to a uniform classification system filed by the rate service organization and approved by the Commissioner.

3. NCCI is the designated rate service organization for the State of Tennessee pursuant to Tenn. Code Ann. § 56-5-320.

4. Rule 1-D of the *Basic Manual* provides in pertinent part:

> The purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer within a state. Subject to certain exceptions described in this rule, each classification includes all the various types of labor found in a business.

It is the business that is classified, not the individual employments, occupations or operations within the business.

Certain exceptions apply and are noted below.

* * * *

4. Standard Exceptions

Standard Exceptions must be separately classified unless specifically included in a classification assigned to the business.

Classifications for Standard Exceptions apply even if the basic classification includes phrases such as "all employees" or "all operations."

5. Businesses Described by a Standard Exception Classification

If the principal business is described by a Standard Exception Classification, the operations of all employees not included in the definition of Standard Exception classification must be assigned to the separate basic classification that most closely describes their operation. Classification rules apply separately to each legal entity operating in a state even if multiple entities are insured under a single policy.

5. Rule 1-C-1 of the *Basic Manual* states:

1. Classification Captions and Notes

The *caption* is the heading that precedes the classification itself and is part of the classification wording.

The *note* is the phrase that follows the classification and is part of the classification wording.

The classification wording, including captions and notes, controls, restricts, or explains the classification usage.

6. TTC has shown by a preponderance of the evidence that Code 5183 (Plumbing NOC and Drivers) is not a more appropriate classification for TTC than Code 7515 (Oil or Gas Pipeline Operation and Drivers). The *Basic Manual* definition for Code 7515 states that the classification applies to the operation of "on stream pipelines for the cross-country transmission of oil and gas." TTC does not perform all of the types of work listed in the *Scopes® Manual* for Code 7515, such as meter reading, operating pumping stations, or maintenance of rights-of-way, but it does perform line maintenance. The pipelines TTC inspects and repairs are "on stream" to the

extent that that they transfer a pressurized volume of natural gas. NCCI's determination that Code 7515 is not applicable is in part based on an interpretation of the term "cross-country" which would make it applicable only to, for example, a business with operations in more than one state or one which maintains a pipeline with sufficiently large diameter to transfer gas at greater volumes or distances than one which maintains pipelines only for a local distribution company, such as Piedmont. Neither the *Basic Manual* or the *Scopes® Manual* provides conclusive guidance on the precise meaning of the term "cross country," however, and it not clear based on the evidence presented at the hearing why it would not be applicable to any business which operates a business which is part of a natural gas transmission system in which gas from a producing state is delivered in another state in which it is used.

Whether Code 5183 is the appropriate classification for TTC is not dependent on it must be licensed to perform plumbing work. Any person engaging in plumbing work involving a total cost of less than $25,000 must be registered under the Limited Licensed Plumbers Act of 2004, Tenn. Code Ann. § 62-6-401, *et seq*., and a Metro plumbing license may be required to perform plumbing work in Davidson County. However, as NCCI correctly noted, the *Scopes® Manual* phraseology for Code 5183 does not include a license requirement.

The main question in this matter of whether Code 5183 is appropriate is, instead, whether the work performed by TTC can be considered "plumbing." Most definitions of the term "plumbing" refer to an activity which takes place in a building, either a commercial business or residence. Tenn. Code Ann. § 62-6-402 (6), for example, defines "plumbing work" as:

> . . . the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down or furnishing of labor to install material or equipment within any residential or commercial building of all piping, fixtures and appliances for the supply of gas, water,

liquids or disposal of waste water or sewage; provided, that there is no intent to require licensure under this part for plumbing work performed outside a residential or commercial building, including, but not limited to, utility connections or irrigation systems.

TTC does not perform any work within buildings and cannot be considered to be engaged in plumbing. Code 5183 is, therefore, not the appropriate classification.

8. Tenn. Comp. R. & Regs. 0780-1-82-.10(2)(g) provides that "[o]rders issued under . . . this Rule "shall assign the costs of the appeal, in the commissioner's discretion, to the non-prevailing party."

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

1. All employees of TTC are to be classified under Code 7515;

2. AON and subsequent workers compensation insurers of TTC shall classify TTC consistent with this Order; and

3. Costs of this matter shall be borne by American Zurich Insurance Company.

This Final Order is entered and effective this the 5th day of August, 2012.

Chlora Lindley-Myers
Assistant Commissioner for Policy

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 8th day of August 2012.

Thomas G. Stovall, Director
Administrative Procedures Division

NOTICE OF APPEAL PROCEDURES

Review of Final Order

This Final Order is issued pursuant to Tenn. Comp. R. & Regs. 0780-1-82-. 10. Any party who is aggrieved by this Final Order is entitled to judicial review pursuant to Tenn. Code Ann. § 4-5-322. See Tenn. Comp. R. & Regs. 0780-1-82-il.

Tenn. Code Ann. § 4-5-322 provides in relevant part:

(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method ofjudicial review.

* * * * *

(b)(l)(A) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County, unless another court is specified by statute. Such petition shall be filed within sixty (60) days after the entry of the agency's final order thereon.

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(2) In a case in which a petition for judicial review is submitted within the sixty-day period but is filed with an inappropriate court, the case shall be transferred to the appropriate court. The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition for reconsideration. Copies of the petition shall be served upon the agency and all parties of record, including the attorney general and reporter, in accordance with the provisions of the Tennessee Rules of Civil Procedure pertaining to service of process.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing that shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the court, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied. The reviewing court shall not consider a stay unless notice has been given to the attorney general and reporter; nor shall the reviewing court consider a stay unless the petitioner has previously sought a stay from the agency or demonstrates that an agency ruling on a stay application cannot be obtained within a reasonable time.

CERTIFICATE OF SERVICE

A copy of the within and foregoing document has been served upon,

Daniel C. Todd, Esq.
Todd, Floyd & Hammet, PLC
3817 Bedford Avenue, Suite 220
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W. Davidson Broemel, Esq.
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Michael R. Shinnick
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500 James Robertson Parkway, Fourth Floor
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By depositing same into the United States Mail enclosed in an envelope with adequate postage affixed thereon.

This the 9th day of August, 2012.

Jacquie Fortenberry

Jacquie Fortenberry