

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

RECEIVED  
2007 APR 20 PM 2:38

SECRETARY OF STATE

IN THE MATTER OF: )  
TENNESSEE MINING SERVICES, LLC, ) Doc. No.:12.28-086924A  
and )  
ZURICH-AMERICAN INSURANCE ) WC Appeal - Insurance  
COMPANY )  
)

---

**FINAL ORDER**

---

This matter came to be heard October 17, 2006, before John Hicks, Administrative Judge, assigned by the Secretary of State, along with John F. Morris, Deputy Commissioner for the Tennessee Department of Commerce and Insurance. Mr. Morris sat as the Commissioner's designee and as such makes the final determination as to findings of fact in this matter. Mr. Todd Kiscaden appeared on behalf of Tennessee Mining Services, LLC which was not represented by counsel at the hearing. Zurich-American Insurance Company was represented at the hearing by Attorney Michele B. Fassfender.

**FINAL ORDER**

The subject of this hearing was whether Zurich-American Insurance Company (hereinafter referred to as "Zurich") correctly adjusted the class code for certain employees of Tennessee Mining Services, LLC (hereinafter referred to as "TMS") from class code 6217 - Excavation to class code 1016 - Coal Mining. After consideration of the record in this case, it is determined that Zurich adjusted the class code correctly to code 1016 - Coal Mining based upon the business operations of TMS. This decision is based upon the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. The Commissioner of the Department of Commerce and Insurance for the State of Tennessee (hereinafter referred to as the "Commissioner") has her official residence in Nashville, Tennessee at Davy Crockett Tower, Fifth Floor, 500 James Robertson Parkway. The Commissioner has jurisdiction of this matter pursuant to Tenn. Code Ann. § 56-5-309(b).

2. Zurich currently holds a certificate of authority to sell workers' compensation insurance in this state and is in the business of providing workers' compensation insurance to employers in Tennessee.

3. TMS is a contracting company with a mailing address of PO Box 1675 Ashland, Virginia 23005. TMS does business in the State of Tennessee.

4. The National Council on Compensation Insurance (hereinafter referred to as the "NCCI") is the designated rate service organization for Tennessee and defines the class codes used in this state for purposes of workers' compensation insurance rating.

5. Beginning in June or July of 2004, TMS began working at Jakes Creek Mine #1 in Grundy County, Tennessee. No facilities or navigable roads existed prior to TMS' presence at the mine. TMS constructed a gravel road to the mining site, brought in prefabricated mining equipment including a coal loading bin and scales, excavated a mine entrance and fabricated the remaining equipment. Equipment was used by TMS to clear brush, make cuts and fills for the road bed and install culverts.

6. After road completion, a mine opening was excavated with the Cat excavator, a hydraulic hammer and hauling truck. A steel tower and coal truck loading area was constructed by metal cutting and welding to support a prefabricated loading bin and scales. TMS also built a canopy, fan housing and outside conveyor assembly to transport coal from the mine. TMS dug

two small ponds for sediment control. TMS also placed two portable buildings at the site, a one-room office for shipping and water samples and a trailer which is a lamp house for the miner's equipment, lockers and shelter.

7. On March 4, 2005, TMS began mining operations to extract coal. Ongoing construction consisted of completion of the belt conveyor system, coal crusher and truck scales. Two of the six laborers and one excavation equipment operator were laid off on completion of the dirt work for road construction and mine entrance excavation.

8. In or around June or July of 2004, TMS purchased a workers' compensation policy with Zurich through the Tennessee Workers' Compensation Insurance Plan (hereinafter referred to as the "Plan").

9. TMS's original application for insurance submitted to the Plan classified TMS as being in the excavation business. The NCCI defines the scope of the excavation class code as follows:

Classification Code 6217 – Excavation

Description: Code 6217 is applied to specialist contractors engaged in general excavation including ditch digging, burrowing, filling or backfilling provided such operations are not otherwise classified in the manual. The operations involve the removal of earth, small boulders and rocks by power shovels, trench diggers or bulldozers and piling it at the job site for backfill. The material may also be removed by dump trucks for fill in some other area.

Code 6217 includes excavation in connection with building foundations, swimming pools, landscape gardening and waterproofing operations. It does not include excavation in connection with street or road construction, dam or lock construction, pile driving, shaft sinking, caisson or cofferdam work.

10. From some time after the issuance of the policy through November 2004, Zurich attempted to get more information from TMS in order to help it determine the appropriate classification for TMS's policy. Through this process, Zurich determined that TMS's business

was classified incorrectly as excavation. In conformity with federal mining requirements, Zurich cancelled the original policy and reissued a policy in August 2004, with both the mining classification and excavation classification being listed on the policy. Excavation remained listed on the policy at the request of TMS's insurance producer with the understanding that Zurich would use the preliminary audit in order to determine the appropriate classification.

11. A preliminary audit was undertaken by Zurich and was completed on or around January 18, 2005. As a result of the audit, Zurich again determined that the classification was coal mining and not excavation.

12. Upon receiving notice of Zurich's determination, TMS objected and Zurich requested the NCCI to conduct a classification audit. The NCCI, in a report with a survey date of April 19, 2005, determined that the proper classification for TMS was Class Code 1016 – Coal Mining. The NCCI based its determination on the fact that TMS's excavation operations were incidental to its coal mining operations. The NCCI defines the scope of the coal mining class code as the following:

Classification Code 1016 – Coal Mining

SCOPE Code 1016 contemplates excavation and tunneling to obtain coal with such equipment as drilling machines, power-operated hand drills, picks, and hauling equipment such as coal cars, buckets, conveyors and hoists. Also, additional equipment dealing with elevators, ventilation, lighting and communication systems is utilized as well as bulldozers, front end loaders, trucks, crushers, screens and washing equipment. To extract the coal, tunnels and shafts are formed. Walls and ceilings are supported by heavy timber or roof bolts and tracks are set in place for coal cars, men and equipment. The coal is broken loose with hand tools, automatic drills and chippers or by blasting. It is then loaded into haulage cars by hand shovel or automatic conveyor. The coal cars are then driven out of the mine, dumped and returned for reloading. On the surface, the coal is crushed, screened, washed, graded and hauled away by train or trucks.

13. TMS argues that the classification of excavation should be applied to their operations prior to March 4, 2005, when it began mining operations.

## CONCLUSIONS OF LAW

14. Pursuant to Tenn. Code Ann. § 56-5-320, the NCCI is the Commissioner's designated rate service organization for workers' compensation insurance.

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

16. Applying the language of the relevant class codes to the operations of TMS as early as June, 2004, it is the conclusion of the Department that Zurich correctly characterized the business of TMS for all times relevant to this matter to fall under Class Code 1016 – Coal Mining and not Class Code 6217 – Excavation. This conclusion is based on the fact that Class Code 1016 – Coal Mining specifically contemplates that fact that excavating done in anticipation of mining is included within the class code, and that this was the exact purpose of TMS's excavation work.

NOW THEREFORE, IN LIGHT OF THE FOREGOING, the following is hereby **ORDERED**:

1. The proper class code for Tennessee Mining Services, LLC is 1016 – Coal Mining; and
2. Tennessee Mining Services, LLC shall pay to Zurich-American Insurance Company any additional premium owed to Zurich-American Insurance Company as a result of having its operations classified as Class Code 1016 – Coal Mining.

This Final Order is entered and effective this the 18<sup>th</sup> day of April, 2007.

  
\_\_\_\_\_  
John F. Morris  
Deputy Commissioner

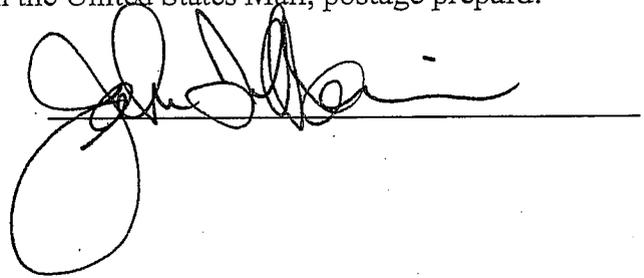
Filed in the Administrative Procedures Division, Office of the Secretary of State  
this 20th day of April, 2007.



Charles C. Sullivan, II, Director  
Administrative Procedures Division

### CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this document has been served upon all parties by delivering same to them, or their counsel, at their address of record, or by placing a true and correct copy of same in the United States Mail, postage prepaid.



672955

RECEIVED

AUG 19 2008

Dav. Co. Chancery Court

IN THE CHANCERY COURT OF THE STATE OF TENNESSEE  
20th JUDICIAL DISTRICT, DAVIDSON COUNTY

TENNESSEE MINING SERVICES, LLC, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 THE DEPARTMENT OF COMMERCE AND )  
 INSURANCE OF THE STATE OF TENNESSEE, )  
 ZURICH-AMERICAN INSURANCE COMPANY )  
 AND ROBERT E. COOPER, JR., ATTORNEY )  
 GENERAL AND REPORTER etc. )  
 )  
 Respondent. )

AT  
No. 07-1349-II

DAVIDSON CO. CHANCERY CT.  
 CLERK & MASTER  
 2008 AUG 28 PM 1:51  
 FILED

**ORDER ON PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND ORDERING REMAND TO COMMISSIONER TO SUPPLEMENT FINAL ORDER**

On August 15, 2008, the Court heard the Motion of Petitioner Tennessee Mining Services, LLC (TMS) to Alter or Amend Judgment, challenging and seeking changes to this Court's Memorandum and Order dated May 30, 2008. The Court has considered the Motion, the Oppositions to the Motion filed by the Commissioner of the Tennessee Department of Commerce and Insurance and by Zurich-American Insurance Company, the arguments of counsel, and the record in this matter, and based on the foregoing, rules as follows:

1. Petitioner's Motion to Alter or Amend is DENIED and this Court declines to grant the requested modification of any rulings already determined by this Court in the Memorandum and Order. This Court has ascertained no basis to change the affirmance of the Commissioner's Final Order of April 20, 2007 made by Court's Memorandum and Order dated May 30, 2008, or to alter the findings and conclusions stated therein, under the standard of review applicable to petitions for review of administrative orders brought under Tenn. Code Ann. § 4-5-322, of the Uniform Administrative Procedures Act.

2. Further, this Court specifically finds that the Commissioner's order to Tennessee Mining Services, LLC to pay Zurich-American Insurance Company the amount of additional premium related to the classification of its business for workers' compensation insurance, that was affirmed by this Court's Memorandum and Order of May 30, 2008, was within the statutory scope of authority and jurisdiction of the Commissioner for such a proceeding held under Tenn. Code Ann. § 56-5-309(b).

3. Additionally, this Court finds it would be appropriate for the Commissioner to clarify the Final Order with a specific dollar amount of premium to be paid under such Final Order, and this Court accordingly exercises the statutory authority to affirm the decision of the agency or remand the case for further proceedings under Tenn. Code Ann. § 4-5-322(h), to ORDER a limited remand of the case to the Commissioner for this purpose. The Commissioner is instructed that on remand, such further proceedings shall be convened for the sole and limited purpose of supplementing the Final Order dated April 20, 2007, attached to TMS petition filed herein and found at pages 21-27 of the administrative record on file, with the Commissioner's determination of the exact dollar amount of additional premium, if any, that Tennessee Mining Services, LLC is ordered to pay to Zurich-American Insurance Company. The Commissioner shall make such findings of fact and conclusions of law necessary to such supplemental determination and the ruling shall be consistent with this Court's affirmance of the Commissioner's prior Final Order respecting the appropriate workers' compensation classification of TMS. The proceeding before the Commissioner on this remand to produce a supplemental order shall not consider any other evidence, matters, or legal issues outside the existing administrative record, besides those factual and legal determinations necessary to order a specific dollar amount of additional premium, if any, to be paid by TMS consistent with this Court's affirmance of the prior Final Order. Zurich shall

have the burden of proving the amount of additional premium, if any, to which it is entitled. The Commissioner shall give counsel for both parties notice of the hearing and both parties shall have the right to appear and give evidence at the hearing on this remand.

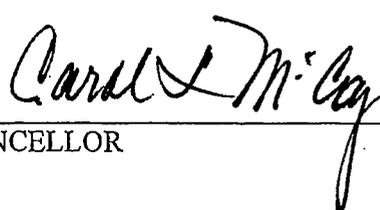
4. Additionally, this Court clarifies that part of a sentence of its Memorandum and Order of May 30, 2008 (page 8) stating "The Petitioner is free to raise these issues in a separate action brought in a separate venue" referring to Petitioner's claims based on alleged breach of contract or promissory estoppel, by withdrawal of that statement. The Court is of the view, as stated in the remainder of that paragraph, that such issues are original matters that cannot be adjudicated in the context of this case as an administrative appeal on the existing record. Therefore, also, the remand of this matter shall not consider those matters.

5. By virtue of this order of limited remand, any appeal of the Memorandum and Order of May 30, 2008 shall be held in abeyance, until the determinations supplementing the Final Order of the Commissioner as ordered herein, and any further petition to appeal to this Court of the resulting supplementary order. This order of remand and ruling on the Petitioner's Motion to Alter and Amend the Judgment, is not a final appealable order. This Court retains jurisdiction for the following purposes: (i) consideration of any appeal under Tenn. Code Ann. § 4-5-322 of the order of the Commissioner supplementing her previous Final Order of April 20, 2007 with the monetary amount that TMS may be ordered to pay Zurich-American, consistent with this Court's ruling; and/or (ii) if no appeal of the Commissioner's Supplemental Order is taken under Tenn. Code Ann. § 4-5-322, the Court retains jurisdiction for the purpose of entering judgment for monetary amount the TMS may be ordered by the Commissioner to pay Zurich-American in the Commissioner's Supplemental Order. The Court's Order for the monetary amount the TMS may be ordered by the Commissioner to pay Zurich-American in the Commissioner's Supplemental

Order will be the final order from which any party may appeal all issues pursuant to Tenn. Code Ann. § 4-5-323.

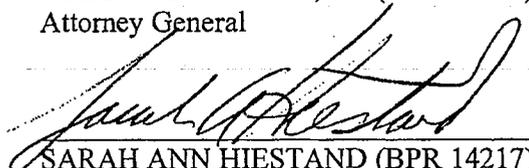
6. The parties are directed to file notice with this Court or file a voluntary dismissal within 30 days of any resolution or outcome of the matter that prevents this Court from further consideration of the case or of any supplemental order of the Commissioner, as these would be grounds for the Court to close this file or to dismiss this action. Any such resolution shall provide for the payment of court costs related to this case.

IT IS SO ORDERED.

  
\_\_\_\_\_  
CHANCELLOR

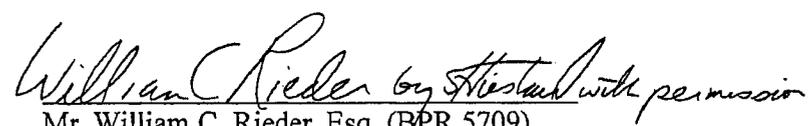
APPROVED FOR ENTRY BY:

ROBERT E. COOPER, JR. (BPR 10934)  
Attorney General

  
\_\_\_\_\_  
SARAH ANN HIESTAND (BPR 14217)

Senior Counsel, Financial Division  
Tennessee Attorney General's Office  
P. O. Box 20207  
Nashville, TN 37202-0207  
(615) 741-6035, fax 532-8223  
Attorneys for Respondent Commissioner of  
Commerce and Insurance, State of Tennessee

HAYNES, HULL, RIEDER, EWELL & RIDNER, P.A.

  
\_\_\_\_\_  
Mr. William C. Rieder, Esq. (BPR 5709)

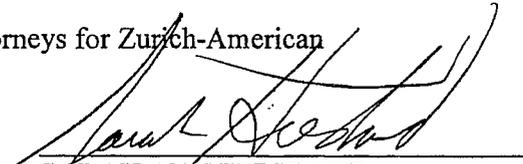
214 N.E. Atlantic St.  
P.O. Box 878  
Tullahoma, TN 37388  
(931) 455-5478  
Attorneys for Petitioner Tennessee Mining Services, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Order on Motion to Alter or Amend and Ordering Remand has been delivered by U.S. Mail, first class postage pre-paid, and via fax to the following counsel for respondent on this the 9<sup>th</sup> day of August, 2008.

Mr. Thomas J. Smith, Esq.  
Spicer, Flynn & Rudstrom, PLLC  
Bank of America Tower  
414 Union Street, Suite 1700  
Nashville, TN 37219  
(615) 259-9080, fax 259-1522

Attorneys for Zurich-American



SARAH ANN HIESTAND

122247-Word

RECEIVED  
2009 MAY -4 11:11 AM

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

SECRETARY OF STATE

IN THE MATTER OF: )  
TENNESSEE MINING SERVICES, LLC, ) Doc. No. 12.28-086924A and  
and ) 12.28-101476 A  
ZURICH-AMERICAN INSURANCE COMPANY ) WC Appeal-Insurance

AGREED ORDER OF SETTLEMENT AND DISMISSAL

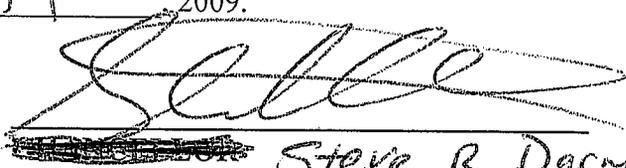
This day came the parties by and through their respective attorneys of record and announced to the Court that all things and matters in controversy between them have been compromised and settled for a valuable consideration, and that this cause should be dismissed on the merits with full prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the within cause be and the same is hereby dismissed on the merits with full prejudice.

The costs of this cause, but not discretionary costs, are taxed to Tennessee Mining Services, LLC.

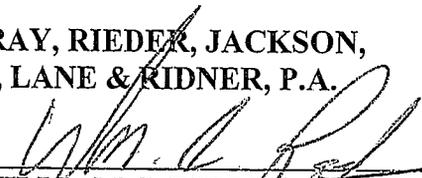
Each party will bear their own discretionary costs and attorneys fees.

ENTER this 5<sup>TH</sup> day of MAY 2009.

  
Steve R Darnell  
Admin. Law Judge

HULL, RAY, RIEDER, JACKSON,  
EWELL, LANE & RIDNER, P.A.

BY:

  
WILLIAM C. RIEDER, BPR #5709

214-N.E. Atlantic Street  
P. O. Box 878  
Tullahoma, TN 37388  
(931) 455-5478  
Attorneys for Petitioner Tennessee Mining Services, LLC

**SPICER, FLYNN & RUDSTROM**

BY:   
THOMAS J. SMITH, BPR #18229  
414 Union Street, Suite 1700  
Nashville, TN 37219  
(615) 259-9080  
Attorney for Respondent Zurich-American Insurance Company