

STATE OF ALASKA  
DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC DEVELOPMENT  
DIVISION OF INSURANCE  
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STATE OF ALASKA  
DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT  
DIVISION OF INSURANCE

IN THE MATTER OF )  
DENALI PARK ZIPLINE, LLC )  
Appellant. )  
\_\_\_\_\_ )

Case No. H 17-03

**PROPOSED DECISION**

**Introduction**

Denali Park Zipline, LLC (Denali) is engaged in the business of providing zipline rides for paying customers and has a workers' compensation insurance policy from Alaska National Insurance Company (ANIC). For Denali's workers' compensation policy the National Council on Compensation Insurance (NCCI) classified Denali's employees under Code 9180 – Amusement Device Operation NOC – Not Travelling & Drivers.

Denali sought exceptions from Code 9180 for its bus drivers and ticket sellers who work at a location remote from the zipline operation and requested a hearing before the Alaska Workers' Compensation Rating and Classification Grievance Committee (Committee) for this relief.

Following a hearing on July 20, 2017, the Committee decided Code 9180 did not allow for any exceptions and did not approve exceptions for Denali's drivers and ticket sellers. Denali, pursuant to AS 21.39.090, appealed the Committee's decision to the Director of the Division of Insurance (Division) who appointed the undersigned as hearing officer for this case.

1 For the reasons which follow, I decline to grant the relief sought by Denali and affirm  
2 the Committee's decision.

3 I. ISSUE PRESENTED

4 Did the Committee err when it decided the NCCI Rules cannot provide exceptions to  
5 Code 9180 for drivers and ticket sellers that are at a location remote from the zipline operation?  
6

7 II. FACTS AND PROCEEDINGS

8 A. Relevant Facts are not in Dispute

9 The relevant facts in this matter are not in dispute. Denali is business that operates  
10 zipline rides at a location about 15 miles away from the entrance of Denali National Park.  
11 Denali's office for ticket sales is also located near the park entrance. The office employees sell  
12 tickets, weigh customers, have them sign the liability release form, and sell souvenirs. Denali  
13 also employs shuttle bus drivers that pick up guests in the Denali National Park area and take  
14 them to Denali's office for weighing in and signing the liability release forms. The bus drivers  
15 then drive customers 13 miles north on the Parks Hwy and drop them off at Denali's private  
16 road about 150 feet off the highway. The drivers then return to the office to await new guests,  
17 drive them to the drop off, and return with guests who have completed the zipline ride. Zipline  
18 rides are conducted by certified zipline guides who also drive the ATVs that take the customers  
19 about three miles to the zipline from the drop off point.

20 B. Grievance Committee Proceedings

21 On July 20, 2017 the Committee heard Denali's dispute regarding excepting its bus  
22 drivers and ticket sellers from Code 9180. Mr. Lawrence Baker, Denali's insurance producer,  
23 and Mr. Mike Davis, part owner of Denali and a Denali executive, represented Denali at the  
24 hearing. The facts presented at the hearing were essentially the same as described above. Mr.  
25 Baker argued that Denali's bus drivers and ticket sellers should be "broken out" of Code 9180  
26

1 because they have no contact with the zipline, unlike a typical amusement park operation where  
2 the attractions are close to the ticket sellers. He also pointed out that in April 2001 the  
3 Committee had previously allowed an exception from Code 9180 for bus drivers working for  
4 Moose Mountain, Inc., a Fairbanks area ski attraction. A document dated May 22, 2001 with  
5 the heading "Agendas & Minutes", from the Committee meeting held on April 26, 2001, is part  
6 of the record and shows the Committee approved an exception for Moose Mountain's bus  
7 drivers. The document states:

8  
9 Skiers are transported to the ski area by bus. There are no traditional lift operations  
10 such as chair lifts, T-bars, or rope tows. The lift buses are only driven on privately owned roads  
11 Mr. Greer requested that drivers be assigned to Code 7380-Drivers in lieu of Code 9180.

12 In executive session, the committee agreed that drivers are included in the scope of  
13 Code 9180. However, based on the unique operation of Moose Mountain, it was determined  
14 that an exception was warranted and that drivers may be separately classified to Code 7380.

15  
16 Speaking on behalf of the carrier ANIC, Ms. Carmen Reese said Code 9180 does not  
17 contain an exception based on distance from the operation. Mr. Michael Craddock, representing  
18 NCCI, did not have any additional information for the Committee regarding the Moose  
19 Mountain decision.

20 Following the hearing, the Committee went into executive session and, in a letter dated  
21 July 31, 2017, issued its decision. The Committee acknowledged that Denali's ticket office is  
22 not near the zipline. The Committee noted that Code 9180 is filed and approved for use in  
23 Alaska, specifically includes ticket sellers without mention of where those sellers are located,  
24 and also includes drivers. The Committee recognized that selling tickets is not as hazardous as  
25 operating a zipline, but reasoned that including ticket sellers in the code may reduce Code  
26 9180's overall rate. The Committee, after discussion and a vote, resolved that Code 9180 was  
correctly assigned to Denali's ticket sellers and drivers.

### C. Hearing Officer Proceedings

1 In a letter dated August 29, 2017, signed by Mr. Kyle Davis and Mr. Michael Davis,  
2 Denali appealed the Committee's decision to the Division. Division Director Lori Wing-Heier  
3 appointed the undersigned as hearing officer for this matter. The parties, Denali and ANIC,  
4 submitted prehearing briefing and on April 24, 2018 a hearing was held at the Division's office  
5 in Anchorage.

6 At the hearing Mr. Wickwire represented Denali. Also present for Denali were Mr.  
7 Baker and Mr. Mike Davis. Representing ANIC was Ms. Diane Valentine and present for  
8 ANIC was Ms. Carmen Reese. Mr. Michael Craddock of NCCI was also present  
9 telephonically with NCCI counsel Ms. Victoria Dorsey.  
10

11 Mr. Davis testified regarding how Denali operated the zipline, including the distance  
12 between the ticket sellers and the zipline at that the bus drivers drop off customers 3 miles from  
13 the zipline. Mr. Davis stated other zipline operators in the state had a code other than 9180, but  
14 he did not know who they were or what code was used.

15 Mr. Baker testified that Denali should be granted an exception because of the distance  
16 between the ticket sellers and bus drivers from the zipline. He pointed out this what the  
17 committee did with Moose Mountain. He also testified he knew of 3 other zipline operators in  
18 the state that were classified under different codes.

19 Ms. Reese testified consistently with her statement at the Committee hearing. Mr.  
20 Craddock testified as well, He testified that he did not have any information about how other  
21 zipline operators in the state were classified.

22 At closings Mr. Wickwire claimed that Denali was misclassified as Code 9180 and  
23 because of this misclassification other zipline operators in the state were paying less for  
24 workers' compensation insurance than Denali. He argued that fairness and consistency required  
25 NCCI reclassify Denali.  
26

1 In her closing Ms. Valentine objected to Mr. Wickwire's argument that Denali should  
2 be reclassified. She argued Denali never raised this issue at the Committee hearing. The only  
3 issue before the Committee was whether Denali should get an exception to Code 9180 for its  
4 ticket sellers and bus drivers. She argued Code 9180 was the correct code for amusement rides  
5 like a zipline and this code included drivers and ticket sellers. Ms. Valentine dismissed the  
6 Moose Mountain decision because it predated NCCI rule changes from 2008.

7  
8 III. DISCUSSION

9 A. Misclassification of Denali is Not Part of this Appeal

10 At the April 24, 2018 hearing Mr. Wickwire claimed other zipline operators in the state  
11 had been assigned codes other than Code 9180 and, as a consequence, were paying less for  
12 workers' compensation than Denali. Mr. Wickwire argued that NCCI misclassified Denali and  
13 this was unfair to Denali. Mr. Davis and Mr. Baker both testified that other zipline operators in  
14 the state had different classification codes, but could not provide details as to who the operators  
15 were or how their ziplines operated.

16 The record from the Committee hearing on July 20, 2017 shows the sole issue brought  
17 by Denali and heard by the Committee was whether Denali's bus drivers and ticket sellers  
18 should be excepted from Code 9180. The record contains no evidence or argument that Denali  
19 had been misclassified. Further, Denali's letter to the Division requesting an appeal of the  
20 Committee's decision Denali states the "**Issue in Dispute:** Denali Park Zipline LLC is  
21 disputing the assignment of Code 9180 for the ticket seller and drivers." In the letter Denali  
22 requests the ticket sellers and drivers be assigned Codes 8810 and 7380 respectively. The letter  
23 contains no argument regarding misclassification. The record shows the first time Denali  
24 argued it may have been misclassified was at the hearing at the division on April 24, 2018.  
25  
26

1 AS 21.39.090 allows a party affected by an action of the rating organization to appeal  
2 that action to the Director. Following the decision of the Committee, Denali sought an appeal  
3 under this statute. As a general rule appeals are limited to issues and arguments raised in the  
4 prior proceeding. The exceptions are limited to new arguments that raise plain error, do not  
5 depend on new or controverted facts, are closely related to arguments raised at trial, and could  
6 have been gleaned from the pleadings. *Sengupta v. University of Alaska*, 21 P.3d 1240 (Alaska  
7 2001). Denali has not met the conditions cited by the Court in *Sengupta* that would allow its  
8 argument on misclassification to be heard here. Further, even if this argument could be  
9 considered on appeal, the record at hearing consisted solely of mention that other zipline  
10 operators had different code classifications, but no provided no details about how those other  
11 zipline operators ran their ziplines, how NCCI determined what code applied to them, or who  
12 these other operators were. This record is insufficient to provide the basis of a meaningful  
13 decision.  
14

15 B. Code 9180 Includes Drivers and Ticket Sellers

16 The NCCI Basic Manual-2001 Edition, filed and approved for use in Alaska by the  
17 Division, contains the rules used by the NCCI for code assignment. The manual states in Rule  
18 1- D that the purpose of the classification procedure is to assign one basic classification that  
19 best fits the business of the employer and the classification includes all the various types of  
20 labor found in a business. Rule 1-D-3 allows business to have more than one classification, but  
21 only if the business requires certain employees to be separately rated, the insured conducts  
22 certain operations (farming, construction, mercantile business, or employee leasing), or the  
23 insured conducts more than one operation in a state.  
24

25 To assist in applying the manual, NCCI provides Basic Manual Rule 1-C-1, which  
26 explains “the classification wording, including captions and notes, controls, restricts, or

1 explains the classification usage” and Rule 1-C-2-d, that explains the use of “includes” or “&”  
2 in classification wording means that “employees cited after these terms must not be assigned to  
3 another classification.”

4 The NCCI Scopes Manual, also filed and approved for use in Alaska by the Division,  
5 contains NCCI’s classification codes, including Code 9180. Code 9180 is described as:

6 **9180 N/A-TX**

7 **PHRASEOLOGY AMUSEMENT DEVICE OPERATION NOC-NOT**

8 **TRAVELLING-& DRIVERS**

9 **(N/A CO, MA)**

10  
11 Includes ticket sellers or collectors and applies to the operation and maintenance of  
12 merry-go-rounds, swings, roller coasters and similar amusement devices not otherwise  
13 classified. This classification does not apply to amusements, exhibitions, or other  
14 operations separately classified in this manual (such as bath houses, billiard halls, boat  
15 livery, bowling lanes, garages, restaurants, theaters) whether operated by the owner or  
16 lessee of the exhibition or amusement park or through independent concession.

17 Upon review of the description of Code 9180 several factors emerge. First, because  
18 Rule 1-C-1 explains that captions are part of the classification, drivers are intended to be part of  
19 Code 9180. Second, because Rule 1-C-2-d explains that “includes” or “&” before an employee  
20 means that employee must not be assigned a separate classification, therefore, drivers and ticket  
21 sellers in a business assigned Code 9180 cannot be assigned separate codes. Third, Code 9180  
22 contains no limitation on the inclusion of ticket sellers or drivers based on the distance of the  
23 driver or ticket seller from the amusement device. Lastly, the record contains no argument or  
24 evidence that Denali meets the conditions of Rule 1-D-3 to receive exceptions.

25 The record does contain evidence that the approved an exception to Code 9180 in 2001  
26 for bus drivers employed by Moose Mountain. In minutes prepared following the Committee  
meeting of April 26, 2001, the committee decided that drivers employed by Moose Mountain

1 would be excepted from Code 9180 and assigned Code 7380. The minutes state this decision  
2 was based on the "unique operation of Moose Mountain." The record contains no other  
3 documents or information and no witnesses were able to explain the reasoning behind the  
4 decision. In the absence of additional information or documents one is forced to speculate as  
5 the reasoning behind this decision. It may have to do with the ski operation not using any lift  
6 equipment and the drivers were just dropping skiers off at the beginning of the run. However,  
7 this is just speculation and, since applying this decision would rely on speculation, it does not  
8 provide any guidance.  
9

10 IV. HOLDING

11 I find

- 12 • Denali Park Zipline, LLC is assigned Code 9180
- 13 • Code 9180 includes ticket sellers & drivers
- 14 • The Basic Manual states employees that are preceded by "includes" or "&" must not be  
assigned to another classification
- 15 • Code 9180 contains no exception based on the distance from the ticket seller or driver  
from the amusement device
- 16 • The record contains no evidence that Denali Park Zipline, LLC otherwise qualifies for  
an exception from Code 9180

17 Therefore, I decline to grant the relief sought by Denali and uphold the Committee's  
18 decision in this case.

19 Dated this 11 day of May, 2018.

20   
21 Joanne Bennett  
Hearing Officer

22 **Adoption**

23 The undersigned director of the Division of Insurance adopts this Proposed  
24 Decision in Case No. H 17-03 as the final administrative determination in this matter. Pursuant  
25 to AS 21.39.170(c) and Alaska Appellate Rule 602(a)(2), you may appeal this final decision  
26 within 30 days. See the attached Notice of Final Order and Appeal Rights.

1 DATED this 15<sup>th</sup> day of May, 2018.

  
Lori Wing-Heier  
Director

6 **Non-Adoption Options**

7 1. The undersigned director of the Division of Insurance declines to adopt this Proposed  
8 Decision in Case No. H 17-03 and instead orders that the case be returned to the hearing officer  
9 to

- 10      take additional evidence about \_\_\_\_\_
- 11      make additional findings about \_\_\_\_\_
- 12      conduct the following specific proceedings: \_\_\_\_\_

13 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

14 \_\_\_\_\_  
15 Lori Wing-Heier  
16 Director

17 2. The undersigned director of the Division of Insurance revises the Proposed Decision in Case  
18 No. H 17-03 as follows: \_\_\_\_\_

19 Pursuant to AS 21.39.170(c) and Alaska Appellate Rule 602(a)(2), you may appeal this final  
20 decision within 30 days. See the attached Notice of Final Order and Appeal Rights.

21 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

22 \_\_\_\_\_  
23 Lori Wing-Heier  
24 Director

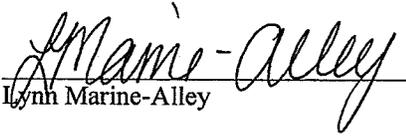
25 I hereby certify that on the 16<sup>th</sup> day of May, 2018, I mailed copies of this document to the following  
26 parties:

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