



FILED

JAN 26 2009

OFFICE OF INSURANCE REGULATION

OFFICE OF
INSURANCE REGULATION
Docketed by:

KEVIN M. McCARTY
COMMISSIONER

REVISED WORKERS' COMPENSATION
RATES AND RATING VALUES AS
CONTAINED IN THE FILING SUBMITTED
BY: NATIONAL COUNCIL ON
COMPENSATION INSURANCE

Case No. 100044-08

ORDER ON RATE FILING

On November 14, 2008, the **NATIONAL COUNCIL ON COMPENSATION INSURANCE** ("NCCI") filed, pursuant to Section 627.091, Florida Statutes, Revised Workers' Compensation Rates and Rating Values (hereinafter the "Filing") for consideration and review by the **FLORIDA OFFICE OF INSURANCE REGULATION** ("OFFICE"). The Filing proposed an 8.9 percent increase in the overall rate level, to be effective March 1, 2009, on new, renewal and outstanding policies.

The **OFFICE**, having concluded that it would be in the public interest to hold a public hearing pursuant to Section 627.101, Florida Statutes, for the purpose of allowing the public an opportunity to speak or present evidence regarding the matters contained in the Filing, and by doing so assist the **OFFICE** in determining whether the Filing meets the applicable requirements of law, held a public hearing ("Hearing") on December 16, 2008, in the Cabinet Meeting Room at the Capitol in Tallahassee, Florida.

The Commissioner of the Office of Insurance Regulation, having considered the Filing and additional information submitted by **NCCI**, the supporting data, oral and written statements presented at the Hearing, rebuttal testimony subsequent to the hearing, the

analysis by the staff of the **OFFICE**, and being otherwise fully advised in the premises finds:

1. The Commissioner of the Office of Insurance Regulation has jurisdiction over the parties and the subject matter of these proceedings.

2. Notice of the Hearing was published in Vol. 34, No. 49, The Florida Administrative Weekly on December 5, 2008, on page 6394. Notice was also sent directly to **NCCI** and to other persons requesting to be notified of such events.

3. The proposed overall increase in rate level of 8.9 percent for new, renewal and outstanding business in the Filing has not been justified.

4. **NCCI** states that the proposed increase results from the impact of the Florida Supreme Court's decision on October 23, 2008 in Emma Murray v. Mariner Health Inc. and ACE USA, Case No. SC07-244.

5. **NCCI** acknowledges that the only data **NCCI** collects from its insurers on attorney fees or attorney involvement is limited to two optional fields in the Unit Reports and three fields in the Call for Detailed Claim Information (DCI); one of which is optional. Since the DCI data is only a sample of claims and the Claimant Legal Expenses Paid to Date field is optional, **NCCI** relies on data from the Office of the Judges of Compensation Claims or the Division of Workers' Compensation. The claimant attorney fees from the Office of the Judges of Compensation Claims are based on award date, which means that the amounts for a year include multiple accident years both before and after the 2003 reform. Thus, **NCCI** uses the much older data (years 1990 to 1999) from the Division of Workers' Compensation to estimate the portion of total claim cost due to Claimant Attorney Fees.

6. In the filing **NCCI** took the claims reported on the DCI call that have claimant attorney involvement; applied on-level factors for benefit level and wage level; and compared the average claim size for accident years 2005 and 2006 versus the average for accident years 2000 to 2002. **NCCI** attributes this entire difference of -15.7% in average claim size to the attorney fees required by Senate Bill 50A. The average size of a claim can be affected by a number of factors unrelated to the amount of the attorney fee as shown by the changes in average claim before Senate Bill 50A. Several participants at the hearing indicated that in their opinion, **NCCI** had underestimated the impact of attorney involvement on the average size of the claims. In fact, as the size of the average claim with attorney involvement was decreasing post reform, the size of the average claim without attorney involvement has increased. This implies that a return to pre-reform attorney fees could have an even greater affect on claims with attorneys than indicated by the change in average claim size for claims with attorney involvement.

7. In the filing, **NCCI** uses Financial Call data to calculate the claim frequency during the pre-reform period and post reform period for both Florida and Countrywide excluding Florida. **NCCI** calculates the ratio of Florida's post reform frequency to Countrywide excluding Florida frequency for the same period. **NCCI** compares the ratio of Florida frequency to Countrywide excluding Florida in the post reform period to the ratio of Florida frequency to Countrywide excluding Florida in the pre-reform period. Then, **NCCI** averages these two ratios to get an annual frequency decline due to lack of attorney involvement of -6.4%. This annual change of -6.4% is compounded over 4 years to get a total frequency decline of -23.2%. **NCCI** attributes this decline in frequency to the revision in attorney fees required by Senate Bill 50A. However, other states have had significant declines in frequency without changing the attorney fee

provisions. Since **NCCI** believes the decline in frequency is due to the revision in Senate Bill 50A for attorney fees, the expectation is that the percentage of claims with attorney involvement would also decline, but this has not occurred. Thus, this means that the number of claims has decreased for both claims with attorney involvement and for claims without attorney involvement. This suggests that some other factor could be contributing to the decline in claim frequency. While attorney involvement may have some impact on the frequency of claims, it is very difficult to quantify.

8. **NCCI** relies on the DCI call to evaluate the impact of attorney involvement on workers' compensation claims. There are a number of issues with DCI data including the under sampling of permanent totals and death claims, the improper coding of injury types and changes in database over time as claims are added or corrected. While these issues may not impact the specific analysis done by **NCCI**, it is not clear that an analysis was done to evaluate the impact of these potential problems.

9. Although not specifically quantified by **NCCI**, the effect of attorney involvement on claim closure and return to work was cited by several participants at the public hearing as having a significant impact on workers' compensation claims. At the hearing, **NCCI** presented an exhibit that shows a substantial increase in the closure rate after 2003 for claims that have an attorney. **NCCI** also provided an exhibit at the hearing that shows a significant improvement in return to work after the 2003 reforms. Somewhat surprising is the distribution of claims with attorney involvement after the 2003 reforms. Despite the reduced attorney fees, there is more attorney involvement in the smaller claims after the reform. However, it appears that claimant's attorneys are spending less time on the cases and seeking earlier settlements, which is reflected in the faster closure rate at 18 months after the accident. If attorneys have more incentives to keep

claims open due to being paid on an hourly basis, there will be an increase in workers' compensation cost, which could be substantial. The ratio of the average claim with attorney involvement to the average claim without attorney involvement was around three times before the 2003 reform but this ratio has declined to two times after reform. If the result of the Emma Murray decision is to reverse this ratio to what it was pre-reform, there will be a substantial impact on losses and rates.

WHEREFORE, in consideration of the foregoing and being otherwise duly advised in the premises, it is hereby ORDERED:

The Filing of **NCCI** is hereby DISAPPROVED. The Filing will be approved provided the Filing is amended to comply with all of the following and such amendments to the Filing are filed as soon as practicable.

A. The statewide overall rate level change for the Filing for new and renewal policies for other than the "F" classifications shall be +6.4 percent (+6.4%), effective April 1, 2009.

B. The statewide overall rate level change for the Filing for new and renewal policies for the "F" classifications shall be +2.0 percent (+2.0%), effective April 1, 2009.

C. There shall be no change in rates for outstanding policies.

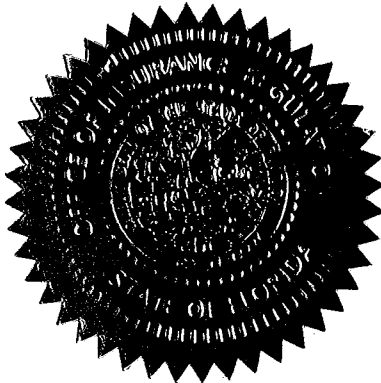
D. Considering the importance of attorney involvement in the workers' compensation system, **NCCI** should establish a way to collect this data from its insurers or from outside sources. As the Designated Statistical Agent for the **OFFICE**, **NCCI** shall begin collecting claimant attorney fees and employer attorney fees on Unit Reports using the Workers Compensation Statistical Plan for policies dated 4/1/2009 and thereafter on a mandatory basis instead of the current optional basis.

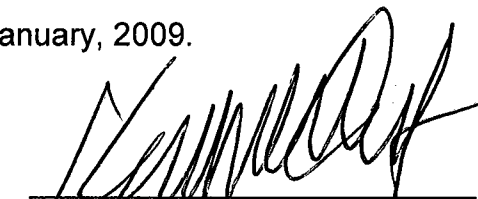
E. **NCCI** shall list and explain each and every change in the proposed manual pages, including the experience rating plan manual and the retrospective rating plan manual. These shall be shown in the summary exhibit and described by an explanatory memorandum.

F. The effective date of the rate change for new and renewal policies shall be no earlier than April 1, 2009. To meet statutory timeframes for an April 1, 2009 effective date, **NCCI** shall file the necessary amendments to the Filing as may be required to implement the terms of this Order as soon as practicable but no later than February 2, 2009. No rate change shall be implemented until such amendments are properly filed and final approval is issued by the **OFFICE**.

By making a filing to comply with this order, **NCCI** waives any right to any further proceedings and authorizes the **OFFICE** to enter a final order on the Filing.

DONE and ORDERED this 26th day of January, 2009.





Kevin M. McCarty
Commissioner

Copies furnished to:

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NOTICE OF RIGHTS

Pursuant to Sections 120.569 and 120.57, Florida Statutes and Rule Chapter 28-106, Florida Administrative Code (F.A.C.), you may have a right to request a proceeding to contest this action by the Office of Insurance Regulation (hereinafter the "Office"). You may request a proceeding by filing a Petition. Your Petition for a proceeding must be in writing and must be filed with the General Counsel acting as the Agency Clerk, Office of Insurance Regulation. If served by U.S. Mail the Petition should be addressed to the Florida Office of Insurance Regulation at 612 Larson Building, Tallahassee, Florida 32399-4206. If Express Mail or hand-delivery is utilized, the Petition should be delivered to 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0300. The written Petition must be received by, and filed in the Office no later than 5:00 p.m. on the twenty-first (21) day after your receipt of this notice. Unless your Petition challenging this action is received by the Office within twenty-one (21) days from the date of the receipt of this notice, the right to a proceeding shall be deemed waived. Mailing the response on the twenty-first day will not preserve your right to a hearing.

If a proceeding is requested and there is no dispute of material fact the provisions of Section 120.57(2), Florida Statutes may apply. In this regard you may submit oral or written evidence in opposition to the action taken by this agency or a written statement challenging the grounds upon which the agency has relied. While a hearing is normally not required in the absence of a dispute of fact, if you feel that a hearing is necessary one may be conducted in Tallahassee, Florida or by telephonic conference call upon your request.

If you dispute material facts which are the basis for this agency's action you may request a formal adversarial proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes. If you request this type of proceeding, the request must comply with all of the requirements of Rule Chapter 28-106.201, F.A.C., must demonstrate that your substantial interests have been affected by this agency's action, and contain:

- a) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- b) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
- c) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action; and
- d) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

These proceedings are held before a State Administrative Law Judge of the Division of Administrative Hearings. Unless the majority of witnesses are located elsewhere, the Office will request that the hearing be conducted in Tallahassee.

In some instances, you may have additional statutory rights than the ones described herein.

Failure to follow the procedure outlined with regard to your response to this notice may result in the request being denied. Any request for administrative proceeding received prior to the date of this notice shall be deemed abandoned unless timely renewed in compliance with the guidelines as set out above.

Revised 02/04/2008