



OFFICE OF INSURANCE REGULATION

DAVID ALTMAIER
COMMISSIONER

FILED
SEP 27 2016
OFFICE OF
INSURANCE REGULATION
Docketed by: 1078

Revised Workers' Compensation Rates and
Rating Values as Filed by the

Case No. 191880-16

NATIONAL COUNCIL ON
COMPENSATION INSURANCE, INC.

ORDER ON RATE FILING

On May 27, 2016, the **NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC. ("NCCI")** filed, pursuant to Section 627.091, Florida Statutes, Revised Workers' Compensation Rates and Rating Values for consideration and review by the **FLORIDA OFFICE OF INSURANCE REGULATION ("OFFICE")**. The filing proposed a 17.1 percent increase in the overall rate level, to be effective August 1, 2016, on new, renewal and outstanding workers' compensation policies. On June 30, 2016, **NCCI** submitted an amended filing (the "Filing") which proposed a 19.6 percent increase in the overall rate level to become effective October 1, 2016, on all new, renewal and outstanding policies.

The **OFFICE** held a public hearing ("Hearing") on August 16, 2016, in room 412 of the Knott Building, 404 South Monroe Street, Florida Capitol Complex, in Tallahassee, Florida to provide an opportunity for members of the public to comment on the filing. Prior to the Hearing, the Filing was made available on the **OFFICE's** website, and news releases alerted the public to the time and place of the Hearing. The **OFFICE** also provided an opportunity for any interested party to make comments by e-mail or letter.

The **OFFICE**, having considered the Filing and additional information submitted by **NCCI**, the supporting data, oral and written statements presented at the Hearing, additional testimony and public comment received, the analysis by the staff of the **OFFICE**, and being otherwise fully advised in the premises finds:

1. The **OFFICE** has jurisdiction over the parties and the subject matter of these proceedings.

2. Notice of the Hearing was published in Vol. 42, No. 131, The Florida Administrative Register on July 7, 2016, on page 3004. Notice was also sent directly to **NCCI** and to other persons requesting to be notified of such events.

3. The Filing proposes an overall increase in rate level based on the combined impact of the Florida Supreme Court's decision on April 28, 2016, in Marvin Castellanos v. Next Door Company, et al. ("Castellanos"), Case No. SC13-2082; the Florida Supreme Court's decision on June 9, 2016, in Bradley Westphal v. City of St. Petersburg, etc., et al. ("Westphal"), Case No. SC13-1930; and Senate Bill 1402 (Chapter 2016-203, Laws of Florida) that ratified the Florida Division of Workers' Compensation's updates to the *Florida Workers' Compensation Health Care Provider Reimbursement Manual*, 2015 Edition.

4. In reaction to high workers' compensation insurance premiums, the legislature enacted Senate Bill 50A (Chapter 2003-412, Laws of Florida) ("SB 50A") in 2003 to reform the workers' compensation laws of Florida. The cases decided recently by the Florida Supreme Court reviewed, in part, the constitutionality of these reforms and consequently revised the law relating to the limitations on attorneys' fees.

5. In the Filing, **NCCI** presented two analyses to quantify the rate level impact of the *Castellanos* case. The first analysis compared the average pure loss cost changes

for Florida to two regions, the Southeastern States Region and the Gulf States Region (“Loss Cost Analysis”). The second analysis reviewed the changes in average total benefit costs for claims with claimant attorney representation. The average benefit costs for these claims were compared including and excluding the top 1% of claims based on reported total incurred losses (“Benefit Cost Analysis”). For both analyses, **NCCI** defined the years 2000 to 2002 as pre-SB 50A and defined the years 2005 to 2006 as post-SB 50A.

6. In the Loss Cost Analysis, **NCCI** compared the average pure loss cost changes in Florida to the average pure loss cost changes of the two regions. Based on this comparison, **NCCI** stated that Florida’s pure loss cost declined at a faster rate than the pure loss costs of the two regions from 2000-2002 to 2005-2006. Florida’s average pure loss cost declined between -12.2 and -27.3 percent over and above the decline observed in the regions. As a result of this analysis, **NCCI** asserted that the *Castellanos* decision could increase overall Florida workers’ compensation system costs by 13.8 percent to 37.5 percent.

7. Many factors could be contributing to the differences between Florida and the regions in the pre-SB 50A to post-SB 50A timeframes other than the change to the attorney fee structure. For example, economic climates such as the recession and housing boom, industry mixes, hurricane activity with subsequent recovery, demographic changes, and other state differences could be impacting the data used in the analysis. **NCCI** acknowledged that the difference between Florida’s average pure loss cost and the regions’ average pure loss costs could be due to influences unrelated to the attorney fee change in SB 50A, such as other system changes in Florida as well as other influences on the systems of surrounding states. **NCCI** did not perform an

analysis to attempt to quantify the portion of the loss cost differences attributed to the attorney fee changes versus the impact of these other potentially contributing factors. In addition, **NCCI** did not do a post reform analysis to determine whether the initial estimates of the impact of all other provisions contained in SB 50A other than the attorney fee change materialized in line with **NCCI's** initial expectations and assumptions. **NCCI** assumed that the estimate included in the adjustments to current benefit levels for all other aspects of SB 50A was accurate as initially priced and attributed any potential excess cost savings due to SB 50A solely to the revision in attorney fees required by SB 50A. While the attorney fee change is likely contributing to the decline in Florida's average pure loss cost from the pre-reform period to the post-reform period, it is difficult to determine what portion of the difference between Florida's average pure loss cost changes and the regions' average pure loss cost changes is attributable to the attorney fee change in SB 50A. **NCCI** could not isolate the attorney fee change from all other potentially contributing factors without additional quantitative analysis and data.

8. In the Benefit Cost Analysis, **NCCI** compared the average total benefit costs (average claim size or severity) for claims with claimant attorney representation for accident years 2005-2006 to the average total benefit costs for claims with claimant attorney representation for accident years 2000-2002. **NCCI** provided this analysis including and excluding the top 1% of claims based on reported total incurred losses. **NCCI** quantified average total benefit costs on attorney represented claims and determined that these costs declined by -25.6 percent to -30.1 percent between the pre-SB 50A period and post-SB 50A period. Based on this analysis, **NCCI** asserted that the first-year impact of the *Castellanos* decision could increase overall Florida workers'

compensation benefit costs by 15.0 percent to 18.1 percent. **NCCI** attributes the entire difference of -25.6 percent to -30.1 percent in average claim size to the attorney fees required by SB 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 variation in average claim size before SB 50A. Additionally, the estimated increase in system costs in the Benefit Cost Analysis does not contemplate any impact on overall system costs due to changes in lost-time claim frequency. Changes in claim frequency must be combined with changes in average claim severity to fully evaluate the potential change to overall losses in the workers' compensation system. For claims with attorney involvement, when combined with a potential increase in claim severity, an increase in lost-time claim frequency could further drive up system costs whereas a decrease in lost-time claim frequency could result in an impact on the system that is less than indicated solely from the increase in severity change alone. **NCCI** stated at the Hearing that it believes the indications shown by the Benefit Cost Analysis were too low because there was no frequency impact included, but did not do a separate frequency analysis to support this assertion. In addition, if there was an impact on average claim size without attorney representation due to the attorney fee change in SB 50A then this should be evaluated as well. Lastly, similar to the Loss Cost Analysis, **NCCI** assumed that the estimate included in the adjustments to current benefit levels for all other aspects of SB 50A was accurate as initially priced and any possible excess cost savings due to SB 50A is attributed solely to the revision in attorney fees required by SB 50A. While the attorney fees required by SB 50A are likely contributing to the change in average benefit costs for claims with attorney representation from the pre-reform period to the post-reform period, it is difficult to determine what portion of the change is attributable to the

attorney fee change in SB 50A versus all other potentially contributing factors without additional quantitative analysis and data.

9. The **OFFICE** received both oral and written testimony indicating that activity on litigated claims has increased since the *Castellanos* decision. **NCCI** provided an exhibit at the Hearing demonstrating that from May 2016 to July 2016 the monthly average petitions for benefits and monthly average claims filed are up from the same period in 2015, and an insurer also submitted data to support increased litigation activity on claims after the *Castellanos* decision. Furthermore, the **OFFICE** received testimony regarding shorter claim durations, quicker return to work, and more efficiency in the system because of the changes in SB 50A. Most credited the attorney fee provision in SB 50A for these observed changes and the resulting decrease in losses, and stated that the *Castellanos* decision would reverse these changes seen in the system since 2003 resulting in claim costs increasing rapidly as a result. If the increase in litigation activity continues or further escalates and has the effect of extending claim durations, delaying return to work and possibly creating inefficiencies in the system, then there could be a more substantial increase in workers' compensation costs in the near future.

10. The proposed overall increase in rate level of 19.6 percent for new, renewal and outstanding policies in the Filing has not been justified.

11. If the Filing were amended, an alternative rate increase of 14.5 percent is justified.

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, but no later than October 4, 2016.

A. The statewide overall rate level change for the Filing for new and renewal policies for other than the "F" classifications shall be 14.5 percent, effective December 1, 2016, which includes a 1.8 percent increase due to Senate Bill 1402 (2016), a 2.2 percent increase due to the *Westphal* decision, and a 10.1 percent increase due to the *Castellanos* decision.

B. The statewide overall rate level change for the Filing for new and renewal policies for the "F" classifications shall be 2.6 percent, effective December 1, 2016 and include a 1.8 percent increase due to Senate Bill 1402 (2016), a 2.2 percent increase due to the *Westphal* decision, and a 10.1 percent increase due to the *Castellanos* decision and shall incorporate the distribution of state and federal losses.

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

D. The **OFFICE** is willing to consider an additional actuarial analysis, data, and justification that **NCCI** may compile to demonstrate that a rate increase in excess of the 10.1 percent increase due to the *Castellanos* decision is necessary.

E. Any insurer may make a filing to deviate from the **NCCI** rate level pursuant to Section 627.211, Florida Statutes, and Rule 69O-189.004, Florida Administrative Code.

F. **NCCI** shall provide the **OFFICE** with an actuarial analysis similar to that provided in an annual experience filing based on the most recent available experience data including but not limited to Policy Years 2013 and 2014 and Calendar Accident Year 2015. **NCCI** shall provide this analysis to the **OFFICE** no later than January 13, 2017.

G. **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.

To meet statutory timeframes for a December 1, 2016 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 October 4, 2016. 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 the **OFFICE** will enter a final order on the Filing.

DONE and ORDERED this 27th day of September, 2016.



David Altmaier

David Altmaier, Commissioner
Office of Insurance Regulation

Copies furnished to:

NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC
901 Peninsula Corporate Circle
Boca Raton, FL 33487

THOMAS J. MAIDA, ESQUIRE
Foley & Lardner
106 East College Avenue, Suite 900
Tallahassee, FL 32301

SHA'RON JAMES
INSURANCE CONSUMER ADVOCATE
DEPARTMENT OF FINANCIAL SERVICES
OFFICE OF THE INSURANCE CONSUMER ADVOCATE
200 East Gaines Street
Tallahassee, FL 32399

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.