

STATE OF NEW HAMPSHIRE
NEW HAMPSHIRE INSURANCE DEPARTMENT

In the Matter of Colonial Green Products Distributors, LLC

PETITION FOR DECLARATORY RULING

NOW COMES Colonial Green Products Distributors, LLC (“Colonial”) by its counsel, Bernard & Merrill, PLLC, pursuant to the provisions of Department of Insurance rule, Ins 209.01, files this Petition for Declaratory Ruling (“Petition”), Appendix to Petition for Declaratory Ruling (“Appendix”) and attached Memorandum of Law and states:

A. Statement of Facts

1. This Petition involves an insurance premium audit dispute between Colonial, Cincinnati Insurance Company (“Cincinnati”) and Travelers Property Casualty Company of America (“Travelers”) regarding Workers’ Compensation Employers Liability Insurance policies (“Policies”) in effect during the period of October 6, 2017 up to present. The policies were issued through the voluntary market with Cincinnati and the residual market with Travelers. See attached sample policies at Appendix to Petition for Declaratory Ruling (hereinafter “Appendix”), pgs. 3 and 57.
2. On October 14, 2019 through October 19, 2019, Cincinnati, through its Field Technical Specialist, Duane Wagenknecht, arraigned a premium audit to occur at Colonial’s place of business on November 20, 2019 at 8:00 am. This audit was to

cover the policy periods of October 6, 2017 through June 19, 2019. Appendix, pgs. 92, 93.

3. On November 4, 2019, Colonial requested that Cincinnati produce “**prior to the audit**” four (4) enumerated requests for 1) “the full policy for each period”; 2) “all internal policies and rules governing the audit and policy”; 3) “the NCCI rules that pertain to these policies”; and 4) the names of the persons conducting the audit. Appendix, pg. 91.
4. On November 8, 2019, Mr. Wagenknecht replied to the requests by stating, 1) “You should have full copies of your policies”; 2) “Rules that govern the audit is within the policy language and the basic manual”; 3) “**All NCCI rule apply**. You can request this from NCCI if you want a complete manual”; and 4) the names of the auditors were provided. Appendix, pg. 90. (Emphasis added).
5. On November 8, 2019, Colonial contacted National Council on Compensation Insurance (“NCCI”) and requested all NCCI rules and manuals that pertain to the policies as Mr. Wagenknecht instructed. Colonial enumerated seven (7) manuals and rules it was seeking. Appendix, pgs. 89, 90. Further reference to all NCCI manuals and rules as enumerated in Colonial’s request will be stated as “NCCI rules”.
6. On November 11, 2019, NCCI, though Ms. Veruschka Zachtshinsky, responded to Colonial’s request by stating, “The requested information can be accessed via ncci.com for a subscription. If you would like to pursue purchasing these electronic manuals, please complete the form here.” Appendix, pg. 89. The cost of an NCCI subscription to access the rules is \$1,600.00.

7. On November 20, 2019, Cincinnati conducted its audit without providing any NCCI rules, even though the request was renewed at the time of the audit. The Filed Audit Supervisor, Mr. Matt Hambright, informed Colonial that the NCCI rules could not be provided due to copyright restrictions. Mr. Hambright confirmed his statement in an email dated November 21, 2019 and stated, “You are correct regarding NCCI’s documents being copywritten. For these reasons, we cannot supply the Basic Manual and [Colonial] has already contacted NCCI asking for the manuals. NCCI stated that he could pay a subscription fee to receive them....” Appendix, pg. 85.
8. Mr. Hambright also confirmed that Cincinnati files its own set of rates with the State of New Hampshire for the voluntary market and would utilize Cincinnati’s rates, not NCCI rates. Appendix, pg. 85.
9. The Policies issued by Cincinnati and Travelers, pursuant to General Section Part A – The Policy, specifically state: “This policy ...is a contract of insurance between you (the employer named in Item 1 of the information page) and us (the insurer named on the information page). **The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.**” (Emphasis added). Appendix, pgs. 14 and 63.
10. The Policies, at Part Five Premium A. **Our Manuals** indicates: “All premium for this policy will be determined by **our manuals of rules**, rates, rating plans and classifications. We may change **our manuals** and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.”

(Emphasis added). Appendix, pgs. 18 and 67. There is no language or endorsement within these Policies which states that NCCI rules are incorporated into the policy or are utilized as “our manuals”.

11. On December 5, 2019, Colonial filed a Declaratory Judgement action, Docket # 213-2019-CV-00277, with the Cheshire County Superior Court concerning whether the NCCI rules are part of the Policies when those rules are literally inaccessible to Policyholders. In addition, there is no language in the Policies informing Policyholders that the NCCI rules are part of “our manuals”.

Furthermore, Colonial requested that the Court decide that if the NCCI rules are somehow incorporated into the Policies, then it is a violation of Policyholders’ New Hampshire constitutional safeguards of fundamental fairness and due process rights, under Part I, Article 15 of the State Constitution when said NCCI rules are not provided to Colonial free of charge.

12. While litigating this issue with Cincinnati, Colonial began having the same issue with Travelers’ policies issued in the residual market in that the NCCI rules were not being provided. There was also an issue of mid-term adjustments being assessed by Travelers. And Colonial was informed that it could not exclude payroll for furloughed workers during the COVID pandemic because Colonial was paying its furloughed workers through PPP loans from the Federal government. This is in direct contradiction to the Department of Insurance’s approval of NCCI’s “new Employee Class Code (0012).” See, Appendix, pg. 94.

13. In addition, Travelers instructed Colonial that it could not exclude payroll for vacation pay, sick days or holiday pay. Just as workers in Class Code 0012

“cannot be doing any work for the employer...therefore, there will be no claims...”; workers on vacation, out from work being sick or because of a holiday, there can be no claims as any injury during off work hours does not give rise to a compensable workers’ compensation claim whereby the policy would come into effect. Essentially, Colonial and other Policyholders are being charge for uninsurable risks, as the Policy’s primary purpose is for coverage “to bodily injury by accident or bodily injury by disease” caused by the risks or hazards created by the terms of employment.

14. On November 5, 2020, Colonial filed a Dispute of Premium with Travelers outlining issues regarding a premium audit, non-disclosure of NCCI rules and a mid-term adjustment. Travelers placed the disputed premium amount from the 2019 – 2020 policy and incorporated the disputed amount into a mid-term adjustment amount on to the 2020 – 2021 policy and requested full payment or else the 2020 – 2021 policy was going to be cancelled. Appendix, pg. 95. However, RSA 417:4 XIV specifically states that it is an “unfair and deceptive act” by “increasing premiums on any policy during its term, **without the consent of the insured.**” (Emphasis added). Travelers and NCCI contend that the NCCI rules allow this type of practice. However, any rules adding to, detracting from or modifying the statute are invalid and void.

15. In the course of attempting to resolve this issue with Travelers and NCCI, on January 7, 2021, Colonial received a response from NCCI stating, “Travelers and the New Hampshire Department of Insurance **do not have the authority to provide full access to NCCI manuals.**” Appendix, pg. 100. (Emphasis added).

16. In addition, NCCI stated, “It is not within Travelers or the NH Insurance Department’s authority to override the **Experience Rating Plan Manual** rules that have been filed and approved for use in New Hampshire or to address the concerns on policies used in calculation of the 2019 experience rating modification.” Appendix, Pg. 101. (Emphasis original).
17. On January 14, 2021, undersigned counsel, forwarded an email to NCCI, the Department of Insurance, Travelers and the Department of Labor outlining the issues Colonial was having with the Travelers policy. Appendix, pg. 110-112.
18. While attempting to resolve Colonial’s issues, NCCI would simply spoon feed certain NCCI rules, by cutting and pasting, which ultimately referenced other NCCI rules which led to other questions concerning the policy and NCCI rules. All NCCI rules have yet to be provided to Colonial. Appendix, pg. 107.
19. It should be noted that to begin NCCI’s Dispute Resolution Process (“Process”), the first step requires the policyholder calculate and pay the undisputed amount. Without access to all NCCI rules it is unreasonable for the policyholder to simply guess at an undisputed amount because there is no way to dispute the undisclosed NCCI rules concerning the experience modification factor, or the schedule modification factor contained in the premium. It is equally unclear as to what statute, Insurance Department rules, NCCI rules or any other rules apply to the “schedule modification” factor being charged in the policy. Appendix, pg. 11.
20. On June 16, 2021, the Superior Court issued an Order on Colonial’s Motion for Summary Judgment. Appendix, pg. 113. The Court Order held the Motion in

abeyance and stayed the proceedings “pending administrative review by the Commissioner” of Insurance. Id. at 121.

21. On June 22, 2021, Colonial informed NCCI, the Department of Insurance, Travelers and Cincinnati of its intent to file this Declaratory Ruling and requested to proceed with the Process with the involvement of both Travelers and Cincinnati. Colonial requested that the Process be held in abeyance until a final ruling is issued on Colonial’s Superior Court Declaratory Judgment action. Appendix, pg. 102 – 103.

22. On July 21, 2021, in preparation for the Process to begin, Colonial requested from NCCI “All documents, correspondence, emails, etc. that were related to” Colonial’s disputes filed with NCCI. Appendix, pg. 138. NCCI’s response was to regurgitate Colonial’s emails to NCCI and NCCI’s responses. Id. at 137. Colonial then requested from NCCI “any and all communications between NCCI and [the insurance carriers involved with the dispute] that relate to Colonial....” Id. at 136. NCCI’s response was “I will need to contact NCCI’s internal counsel to determine what documents I can provide.” Id. Based on NCCI’s response, NCCI does not have any procedural or discovery rules that govern the Process, even though those rules were requested and not provided. Id. at 140. The fact that NCCI is reticent in providing discoverable documents causes this Process to become unreasonable and unfair to Policyholders and violates RSA 412: 5 V and/or RSA 417: 4 XVII (d). This also causes some concern that if NCCI now produces documents it is uncertain if the documents provided have been redacted or not all documents will be produced.

23. There are at least seven (7) NCCI manuals that are required to be disclosed for this Process to work. Those being, (1) NCCI's Basic Manual for Workers Compensation and Employers Liability Insurance; (2) NCCI's Experience Rating Plan Manual, (3) NCCI's Assigned Carrier's Performance Standards, (4) NCCI's Assigned Risk Supplement, (5) NCCI's Policy and Proof of Coverage Guidebook, (6) NCCI's Basic Manual User's Guide, and (7) NCCI's Basic Manual Circulars for New Hampshire from 2016 to present. Colonial has been denied free access to all NCCI's manuals which makes the Process inherently unfair. And according to NCCI the Insurance Department "[does] not have the authority to provide full access to NCCI's manuals." Appendix, pg. 100. However, it is quite clear that insurance carriers issuing policies in New Hampshire have access to these NCCI rules while Policyholders do not.

B. Questions for Declaratory Ruling

- I. Whether the NCCI rules are incorporated and binding in workers' compensation policies, even though the NCCI rules are "literally inaccessible"¹ to Colonial and other policyholders?
- II. Whether the non-disclosure of NCCI rules to policyholders violates RSA 412:1 X which states that the purpose of this chapter is "to protect policyholders and the public against the adverse effects of any policy provision that is not in the public interest or is contrary to public policy."? And/or a violation of RSA 412: 5 I, which states,

¹ See, In Re: Majestic Repossession & Transportation Corp., Docket No.: Ins 11-008-AP (The Insurance Department decision states, "While administrative agencies' rules may at times be labyrinthine, the NCCI rules are **literally inaccessible**." (Emphasis added).

“Every insurer and advisory organization shall file policy forms, endorsements, **and other contract language**... The commissioner may disapprove such form if it contains a provision that does not comply with the requirements of law, is not in the public interest, is contrary to public policy, is inequitable, misleading, deceptive, or encourages misrepresentation of such policy.”?

- III. Whether the NCCI rules are part of the “Our Manuals” language contained in the Policy?
- IV. Whether the NCCI rules are administrative rules adopted by the Department of Insurance?
- V. Whether the practice of charging and attempting to collect disputed premiums by incorporating the disputed amounts into a subsequent policy period violates RSA 417: 4 XII and/or RSA 417: 4 XIV?
- VI. Whether the NCCI Dispute Resolution Process violates RSA 412: 5 V and/or RSA 417: 4 XVII (d) in that the Process does not provide “reasonable means” to “be heard” considering the NCCI rules are not provided to policyholders?
- VII. If the NCCI rules are incorporated into the workers’ compensation policies, and said rules are adopted and approved by the New Hampshire Department of Insurance, is it a violation of policyholders’ constitutional safeguards of fundamental fairness and due process rights, under Part I, Article 15 of the State Constitution when said

NCCI rules are not provided to policyholders when requested, free of charge in order to being the Dispute Resolution Process?

VIII. Whether the inclusion of payroll for vacation, sick days and holiday pay into the premium, where there is no exposure for a workers' compensation claim, violates RSA 412: 35 whereby "A final premium shall be charged based upon **actual exposure** existing during the term of the policy coverage."

WHEREFORE, Colonial Green Products Distributors, LLC respectfully requests that the Department of Insurance issue a ruling on the above referenced questions.

Respectfully submitted,

Colonial Green Products
Distributors, LLC.
By its attorneys,
Bernard & Merrill, PLLC



Dated: July 26, 2021

Gary S. Harding, Esq.
(Bar No. 15335)
814 Elm Street
Manchester, NH 03101
(603) 622-5454
Gary@bernard-merrill.com

PART Ins 209 PETITION FOR DECLARATORY RULING

Ins 209.01 Petitions.

(a) Any person may request a declaratory ruling from the department on matters within its jurisdiction by filing an original and 4 copies of the petition, and the petition for declaratory ruling shall set forth the following information:

- (1) The exact ruling being requested, including any rule or statute implicated;
- (2) The statutory and factual basis for the ruling, including any supporting affidavits or memoranda of law; and
- (3) A statement as to how the language of the rule or statute applies to the circumstances of the petitioner's case.

(b) Any petition for declaratory ruling which does not contain the information required in (a) above shall be inadequate.

Source. (See Revision Note at chapter heading for Ins 200) #13073-A, eff 7-27-20

Ins 209.02 Action on Petitions.

(a) If examination of a petition for declaratory ruling reveals that other persons would be substantially affected by the proposed ruling, the department shall require service of the petition on such persons and advise them that they may file a reply.

(b) The petitioner and any persons served with notice of the petition shall provide such further information or participate in such evidentiary or other proceedings as the department may direct after reviewing the petition and any replies received.

(c) The commissioner shall act on the petition as follows:

- (1) Issue a written ruling within 30 days after receipt of all information or the conclusion of any evidentiary or other proceeding; or
- (2) Reject the petition if:
 - a. It is inadequate;
 - b. It involves a hypothetical situation or otherwise seeks advice as to how the commissioner would decide a future case;
 - c. It does not implicate the legal rights or responsibilities of the petitioner;
 - d. It is beyond the scope of the commissioner's statutory authority;
 - e. There is pending legislation or rulemaking, a pending administrative or judicial proceeding, or a pending investigation or examination that will address the petition; or
 - f. Other procedural options are available to the interested parties or the department.

Source. (See Revision Note at chapter heading for Ins 200) #13073-A, eff 7-27-20