



The State of New Hampshire Insurance Department

21 South Fruit Street, Suite 14
Concord, NH 03301
(603) 271-2261 Fax (603) 271-1406
TDD Access: Relay NH 1-800-735-2964

Christopher R. Nicolopoulos
Commissioner

David J. Bettencourt
Deputy Commissioner

In re Matter of
Colonial Green Products Distributors, LLC

Docket: INS No. 21-050-DJ

ORDER

Pursuant to Ins 209.01, Colonial Green Products Distributors, LLC (Colonial) has filed a petition seeking declaratory rulings on eight issues in relation to insurance premium audits of its business for workers' compensation coverage that include disputes Colonial has with (1) Cincinnati Insurance Company (Cincinnati); (2) Travelers Property Casualty Company of America (Travelers); and (3) the National Council on Compensation Insurance, Inc. (NCCI). The eight questions presented in Colonial's petition are, as follows:

1. Whether the NCCI rules are incorporated and binding in workers' compensation policies, even though the NCCI rules are "literally inaccessible" to Colonial and other policyholders? ¹
2. 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, "Every insurer and advisory organization shall file policy forms,

¹ Hereinafter referred to as "Question 1."

- 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"? ²
3. Whether the NCCI rules are part of the "Our Manuals" language contained in the Policy? ³
 4. Whether the NCCI rules are administrative rules adopted by the Department? ⁴
 5. 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)? ⁵
 6. 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? ⁶
 7. If the NCCI rules are incorporated into the workers' compensation policies and said rules are adopted and approved by the Department, 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 being⁷ the Dispute Resolution Process? ⁸
 8. 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"? ⁹

² Hereinafter referred to as "Question 2."

³ Hereinafter referred to as "Question 3."

⁴ Hereinafter referred to as "Question 4."

⁵ Hereinafter referred to as "Question 5."

⁶ Hereinafter referred to as "Question 6."

⁷ "being" appears to be a typographical error.

⁸ Hereinafter referred to as "Question 7."

⁹ Hereinafter referred to as "Question 8."

I. Procedural Background

In December 2019, Colonial filed a Declaratory Judgment action in Cheshire Superior Court (Court) against Cincinnati pertaining to Colonial's workers' compensation insurance policy with Cincinnati. That dispute included Colonial's requests for and access to manuals of rules of NCCI, which are applicable to workers' compensation policies in New Hampshire. In that action Colonial asked the Court to determine the following two questions:

1. Whether NCCI rules are incorporated and binding in Colonial's workers' compensation policies, even though NCCI rules are "literally inaccessible" to Colonial and other policyholders?
2. If the NCCI rules are incorporated into the workers' compensation policies, and said rules are adopted and approved by the Department, is it a violation of Colonial's 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?

On June 15, 2021, after Colonial filed a motion for summary judgment, the Court, analyzing whether Colonial had failed to exhaust administrative remedies, issued an order holding the court's proceedings in abeyance pending the Department's administrative review of Colonial's questions.

On July 26, 2021, Colonial filed a Petition for Declaratory Ruling (Petition) with the Department, pursuant to Ins 209.01, seeking declaratory rulings for eight questions, as described above. In its Petition, Colonial explains that its insurance premium audit dispute is not limited to Cincinnati, as it currently has a dispute with Travelers about the same issue. The Petition states that on November 5, 2020, Colonial began NCCI's dispute resolution process with Travelers before the New Hampshire Workers Compensation Appeals Board (Board). However,

Colonial states that it requested an abeyance of that process until a final Court ruling on its Declaratory Judgment action.

Upon review of Colonial's petition, on July 30, 2021, the Department ordered Colonial to serve Cincinnati, Travelers, and NCCI, as they had an interest in the relief sought in Colonial's petition. Since that time, Cincinnati, Travelers, and NCCI have filed timely responses to the Petition. On September 27, 2021, Colonial filed a reply (Reply) to the responses filed by Cincinnati, Travelers, and NCCI--all of which are under review by the Department.¹⁰

II. Regulatory Framework Pertaining to Workers' Compensation Policies

Workers' compensation insurers, either individually or in collaboration with others, must file for the Department's approval "every manual, minimum premium, class rate, rating schedule, or rating plan and every other rating rule, and every modification of any of the foregoing that it proposes to use..." related to workers' compensation rates prior to use in the market. RSA 412:28 (I). To do so, insurers may use the services of an authorized advisory organization approved by the Department, such as NCCI. See RSA 412:28 (I)(II); RSA 412:23. In New Hampshire, NCCI computes rates in the voluntary and assigned risk (residual) markets based on its rating manuals, which are approved by the Department. See id.; RSA 404-C:5-a.

¹⁰ The Department notes that the Court referenced a Department hearing in regard to the Petition. However, Colonial did not request a hearing and there is no right to a Department hearing in this matter.

All workers' compensation policies issued in New Hampshire are based on an auditable basis, such that final premiums charged must be based on "actual exposure during the policy term" with audits conducted promptly within six months after expiration or cancellation of the policy. See RSA 412:35 (I)(II)(III). In support of the audit process, insureds may request from an insurer or NCCI "all pertinent information" related to an insured's rate, which must be provided if (1) the request is timely and (2) the insured provides payment of a reasonable charge for said information. See RSA 412:27. If NCCI or the insurer fails to grant an insured's proper request for information within 30 days, an insured may request a hearing at the Department. See id.

NCCI's rating manuals and rules (Manuals) include a dispute resolution process that provides an employer with a process to resolve premium disputes with an insurer. If an employer is unable to reach a resolution with their insurer, they can ask NCCI to refer the matter to the Board to hear the dispute. If an employer is unsatisfied with the Board's decision, they may appeal the dispute to the Department for a *de novo* hearing and review of the matter. If an insured is not satisfied with the Department's final decision, the insured may seek appellate relief from the New Hampshire Supreme Court.

III. Analysis of Colonial's Questions Presented to the Department

Although the Department questions the applicability of Ins 209.01 to the eight questions presented here,¹¹ as a courtesy to the Court and to clarify

¹¹ Ins 209.01 (All petitions must set forth not only the ruling requested but how the language in an administrative rule or statute applies to the petitioner's case).

the Department's role in these regulatory matters, the Department orders as follows:

A. Department's Response to Question 1:

Question 1 must be broken down to fully respond to the issues presented. First, as to whether NCCI rules are "incorporated and binding" in workers' compensation, as described above, NCCI's Manuals assist insurers in calculating workers' compensation rates in New Hampshire, which insurers must file with the Department for approval every year. Parts of the Manuals used to obtain workers' compensation rates, for example, classification codes of the risk of a particular business, would be applicable to workers' compensation policies and any rate audits stemming from those policies. Like underwriting guidelines that apply to other insurance products to determine insurance rates, these guidelines are not embedded within the policies but do apply to them once approved by the Department. As such, "application" of the Manuals to workers' compensation policies is a more accurate term as opposed to "incorporation" into these policies.

As to the issue of accessibility, the Manuals are accessible to insureds. Insureds may obtain a NCCI subscription for full online access to Manuals for \$1600, which the Department considers to be a reasonable charge, consistent with RSA 412:27. Insureds also have a statutory right to all pertinent information from NCCI as to the rate should they choose to forego complete online access to the Manuals for a reasonable charge. Likewise, insureds may seek relief with a hearing at the Department if they are not

satisfied with the information provided by NCCI or their insurer as to their workers' compensation rates. See RSA 412:27.¹² The Legislature has provided a process to allow insureds access to rate information pursuant to RSA 412:27.

As a practical matter, the Department routinely fields calls from insureds and regularly provides insureds relevant information from the Manuals related to workers' compensation rates. Although the Department does not provide an entire copy of the Manuals, which has copyright protection, the Department, with notice to NCCI, frequently provides relevant portions of the Manuals to insureds relating to a workers' compensation rate audits and/or rate disputes. Likewise, since December 9, 2019, the Department has kept an entire, paper copy of the Manuals at the Department so that insureds may review that information at the Department.

Specifically, in this matter, Colonial contacted the Department several times between 2019-2021, either through a representative, Chris Stewart or Attorney Gary Harding, seeking to obtain the Manuals free of charge and refusing to pay NCCI's subscription fee in order to obtain the entire copy of the Manuals online. In 2019, the Department, with prior notice to NCCI,

¹² RSA 412:27: **(Information to be Furnished Insureds; Hearings & Appeals of Insureds)**
I. Every advisory organization and every insurer shall, within a reasonable time after receiving written request therefor and upon payment of such reasonable charge as it may make, furnish to any insured affected by a rate made by the insurer, or to the authorized representative of the insured, all pertinent information as to such rate. If the advisory organization or insurer fails to grant or reject such request within 30 days after it is made, the applicant or insurer may request a hearing from the department pursuant to RSA 400-A:17.

provided relevant information and documents from the Manuals to Colonial, including over 100 pages of the Manuals pertaining to Colonial's workers' compensation rate issue. See, e.g., Attachment A, Department November 18, 2019 Letter to Colonial. This information included rules pertaining to the insurer's audit, the dispute resolution process, and premium rate guidelines. Likewise, since December 9, 2019, Colonial knew that it could review the entire copy of the Manuals at the Department. See Attachment B, Department December 2, 2019 Letter to Colonial. To date, Colonial has not sought to review the Manuals at the Department¹³ and has not sought a hearing from the Department in relation to its workers' compensation rate disputes.

In sum, as to Question 1, NCCI Manuals apply to workers' compensation policies and they are accessible given the current regulatory framework and Department practices.

B. Department's Response to Question 2:

As discussed above, the Manuals are reasonably accessible to insureds through a NCCI subscription or with assistance from the Department. The regulatory framework of workers' compensation policies includes (1) Department approval of NCCI Manuals, (2) annual Department approval of insurer rates, and (3) the Department's *de novo* review of any Board decision

II. If, after a hearing held under this section, it is determined that the rates charged by an insurer are in excess of the otherwise appropriate rate, such overcharge shall be refunded to the insured.

¹³ Colonial's assertion in its Reply that it would need an unusual amount of quarters to make copies of materials at the Department is not accurate. The Department does not have any coin operated copy machines. Rather, the Department may bill recipients a modest fee for voluminous Department copies.

in regard to rate disputes. This framework provides proper regulatory protection of policyholders as to workers' compensation rates and procedures. As such, there is no violation of either RSA 412:1(X)¹⁴ or RSA 412:5(I).¹⁵

C. Department's Response to Question 3:

As discussed in Question 1, NCCI Manuals, once approved by the Department, are applicable to all workers' compensation policies to determine workers' compensation rates.

D. Department's Response to Question 4:

NCCI rules (Manuals) are not administrative rules and do not follow the procedures required for such rules. See RSA 541-A. Rather, as an authorized advisory organization that provides assistance to insurers as to workers' compensation rates, NCCI rules (Manuals) are subject to Department approval. See RSA 412:20; 412:23; 412:28.

E. Department's Response to Question 5:

The regulatory framework for rate approval and rate disputes associated with workers' compensation policies, which includes prior approval by the Department, the mandatory auditing process for these policies,¹⁶ and the dispute resolution process with a *de novo* appeal to the Department, does not involve unfair insurance trade practices. As such,

¹⁴ RSA 412:1(X)(Regulation of Property & Casualty Rates):

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.

¹⁵ RSA 412:5(I): Every insurer and advisory organization shall file policy forms, endorsements, and other contract language covered by this chapter. . . 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. . .

these procedures do not violate RSA 417:4(XII)(Collecting Proper Premium) or RSA 417:4(XIV)(Coverage Reduction). Specifically, as to the substantive claims about premium collection presented in Question 5, this issue is not ripe for review as it should be presented to the Board prior to review by the Department, pursuant to the approved NCCI dispute resolution process within the Manuals.

F. Department's Response to Question 6:

As explained above, the NCCI rules (Manuals) are accessible to policyholders in a variety of ways, including full access to hard copies of the Manuals at the Department since December 2019. Likewise, insureds have a reasonable means to be heard through the dispute resolution process with review by the Department, including the ability to request a hearing at the Department if they are not satisfied with rate information provided by NCCI or their insurer. See RSA 412:27. The dispute resolution process and regulatory framework for appeal of Board decisions do not violate RSA 412:5(V). In addition, this process is not an unfair insurance trade practice under 417:4(XVII)(d).¹⁷

G. Department's Response to Question 7:

As discussed above, the NCCI Manuals, which are approved by the Department, are applicable and accessible to insureds. The Department

¹⁶ See RSA 412:35.

¹⁷ RSA 417:4 (XVII)(d): Unfair insurance trade practices include insurer practices that fail to provide a reasonable means “whereby any person aggrieved by the application of an insurer's rating system” may be heard.

considers the regulatory framework to be fair to insureds with reasonable opportunities for insureds to be heard before the Board and the Department.

As a matter of practice, in the private workers' compensation insurance market, the Department has regulatory authority of annual premiums that exceed \$200 million. The regulatory framework and use of NCCI services to assist insurers with rate calculations support consistency in this market. On average, over the past ten years the Department has received less than 1 request per year from insureds for hearings to review Board decisions. See the Department's website link: [New Hampshire Insurance Department - Property & Casualty, Workers' Compensation \(nh.gov\)](https://www.nh.gov/insurance/property-casualty-workers-compensation). Moreover, if the Department disagrees with the insurer's and/or the Board's application of the Manuals or statutory rate requirements, the Department will overturn the Board's decisions. See *In re Customer Engineering Services* (August 5, 2021) ([SKM 368e21080913450 \(nh.gov\)](https://www.nh.gov/skm/368e21080913450)); *In re Manchester Roofing Company, Inc.* (December 12, 2019) ([2019-02-12mrins18-044-apfo.pdf \(nh.gov\)](https://www.nh.gov/12mrins18-044-apfo.pdf)). Overall, the Department is satisfied that the regulatory procedures involved in workers' compensation rate requirements and disputes provide reasonable notice and protections for insureds.

The Department notes that the New Hampshire Supreme Court distinguishes "property interests" from "financial interests" in its analysis of due process claims. See *Midway Excavators v. Chandler*, 128 N.H. 654, 659 (1984). As such, it is questionable whether the circumstances presented here


trigger a due process claim under Article 15 of the New Hampshire Constitution.

H. Department's Response to Question 8:

The mandatory audit process for an insured and insurer as to workers' compensation policies, as outlined within RSA 412:35, provides a mechanism to ensure that final premium charged is based upon actual exposure during the policy term. To satisfy that statutory requirement insureds and insurers must comply with the audit process within the statute. As in Question 5, the substantive claims within Question 8 about the inclusion of paid time off in regard to premium calculations is not ripe for review. This issue should be presented to the Board, based upon the factual circumstances between the insured and the insurer, prior to review by the Department--as required by the dispute resolution process provided within the Manuals.

SO ORDERED.

Date:



Christopher Nicolopoulos, Commissioner

ATTACHMENT A



John Elias
Commissioner

**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

21 SOUTH FRUIT STREET SUITE 14
CONCORD, NEW HAMPSHIRE 03301

Alexander K. Feldvebel
Deputy Commissioner

November 18, 2019

VIA EMAIL: cstewart@colonialgreenproducts.com

Re: RSA 91-A Request for Documents

Dear Mr. Stewart:

This letter is in response to your emailed request for all the NCCI rules that apply to workers' compensation policies and audits dated November 13, 2019. Please find enclosed the documents responsive to your request.

Laws relating to workers' compensation insurance can be found in RSA 412 and more specifically RSA 412:28-37-b. RSA 412:32 relates to extraterritorial auditing procedure and 412:35 relates to workers' compensation auditable basis policies. Links to the laws can be found on the Insurance Department's website under "Legal Information."

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra Barlow", written in blue ink.

Sandra Barlow
Assistant to the Commissioner

ATTACHMENT B



THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

21 SOUTH FRUIT STREET SUITE 14
CONCORD, NEW HAMPSHIRE 03301

John Elias
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

December 2, 2019

VIA EMAIL: cstewart@colonialgreenproducts.com

Re: RSA 91-A Request for Documents

Dear Mr. Stewart:

This letter is in response to your emailed request for "the full set of general rules" for the NCCI dated November 20, 2019, and received in our office of November 21, 2019. Currently the Insurance Department only has online access to the manuals. The Department is in the process of obtaining hard copies of the manuals. The hard copies are expected to arrive around December 9, 2019.

Once the manuals have arrived, you are welcome to come to the Insurance Department at 21 S. Fruit Street, Concord, New Hampshire to review the manuals. The Department's business hours are 8:00 a.m. to 4:30 p.m., Monday through Friday. Please be advised that the Department charges \$0.25 per page for copies and \$0.50 per two-sided page.

Additionally, information about filing a complaint and complaint forms can be found on the Department's website at <https://www.nh.gov/insurance/complaints/index.htm>.

Sincerely,

A handwritten signature in cursive script that reads "Sandra Barlow".

Sandra Barlow
Assistant to the Commissioner