

No. **4448**

OFFICIAL ORDER
of the
TEXAS COMMISSIONER OF INSURANCE

Date: May 9, 2016

Subject Considered:

**AMENDMENTS TO THE
NATIONAL COUNCIL ON COMPENSATION INSURANCE
BASIC MANUAL, FORMS MANUAL, AND STATISTICAL PLAN
FOR WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE
NCCI FILING ITEM NO. B-1429**

The commissioner of insurance considered amendments to the National Council on Compensation Insurance *Basic Manual for Workers Compensation and Employers Liability Insurance* (NCCI's *Basic Manual*), *Forms Manual of Workers Compensation and Employers Liability Insurance* (NCCI's *Forms Manual*), and *Statistical Plan for Workers Compensation and Employers Liability Insurance* (NCCI's *Stat Plan*) proposed in *Item B-1429—Establishment of Audit Noncompliance Charge* (TDI ECase No. 9507).

After considering the filing, the commissioner adopts the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. NCCI filed *Item B-1429* on May 5, 2015, under the workers compensation manual rule filing procedure adopted in Commissioner's Order No. 3142, dated March 21, 2014. The TDI chief clerk has had copies of the full text of the filing and related exhibits since the filing date. *Item B-1429* proposes that its changes apply to policies with effective dates on or after 12:01 a.m., January 1, 2017.
2. *Item B-1429* is a national filing that establishes an Audit Noncompliance Charge (ANC) rule, endorsement, and statistical code. The purpose of the filing is to provide carriers an option to apply an ANC to an employer that does not allow the carrier to examine and audit the employer's records, as Part Five – Premium, Sections F and G of the standard workers compensation policy requires.
3. On December 15, 2015, TDI published notice of the filing on the TDI website at www.tdi.texas.gov/rules/2015/nccimannual.html and distributed notice of the filing to electronic news subscribers.

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4. The commissioner held a hearing under Docket No. 2787 at 9:30 a.m., Central time, on February 17, 2016, to consider *Item B-1429*.
5. TDI received five written comments, from premium finance companies, before the hearing; and one public comment at the hearing.
6. The five written comments expressed concern that *Item B-1429* would deter premium finance companies from financing workers compensation policies because it would increase their risk of not recovering unearned premium for a canceled policy.
7. In its comment at the hearing, NCCI proposed a revision to the filing to address the commenters' concerns about return of unearned premium.
8. For workers compensation, the carrier applies rates to payroll—the exposure base—to determine premium. The employer estimates payroll at the inception of the policy, and the carrier audits it after the end of the policy term to determine the final premium. As a result of the audit, an employer's premium could increase or decrease for the audited period.
9. Insurance Code §2053.002(b) prohibits rates or premiums that are excessive, inadequate, or unfairly discriminatory.
10. Section 560.002 requires a rate used under the Insurance Code to be just, fair, reasonable, and adequate; and not confiscatory, excessive for the risks to which the rate applies, or unfairly discriminatory. Under §560.002(c)(3), a rate is unfairly discriminatory if it is not based on sound actuarial principles or does not bear a reasonable relationship to the expected loss and expense experience among risks.
11. The ANC proposed in *Item B-1429* does not appear to be tied to a cost or expense, as described in §560.002.
12. Moreover, *Item B-1429* would give carriers discretion as to whether to attach the ANC endorsement to the policy and, if it is attached, whether to apply the ANC. As proposed, the ANC could be up to two times the estimated annual premium, based on the carrier's underwriting judgment, but the amount could vary between policyholders for the same behavior.
13. As proposed, *Item B-1429* does not define what constitutes an attempt to obtain the audit information from the employer, such that the employer would be determined uncooperative and could be subject to an ANC.
14. Currently, carriers have remedies when employers do not comply with a payroll audit, as the policy requires. A carrier may cancel the policy or estimate the payroll for audit purposes.

15. At the hearing, the commissioner asked TDI staff whether audit noncompliance has been a problem for insurers in Texas. Staff responded that TDI staff is unaware of problems with audit noncompliance or complaints about employers being uncooperative with carriers and not allowing payroll audits.

CONCLUSIONS OF LAW

1. The commissioner has jurisdiction over this matter under Insurance Code Article 5.96 and §§2051.201, 2052.002, and 36.001.
2. Commissioner's Order No. 3142, dated March 21, 2014, established a procedure for the commissioner to consider changes to NCCI's manuals:
 - a) NCCI makes a filing;
 - b) TDI publishes notice of the filing on the TDI website and distributes notice of the filing to subscribers to TDI's electronic news, with at least a 30-day period for interested persons to submit comments or request a hearing; and
 - c) the commissioner issues an order approving the filing, approving the filing with changes, or rejecting the filing.
3. TDI gave proper and timely notice in compliance with Commissioner's Order No. 3142.
4. The proposed amendments to NCCI's *Basic Manual*, *Forms Manual*, and *Stat Plan* in *Item B-1429* could violate the rate standards in Insurance Code §560.002 and §2053.002 by allowing an unfairly discriminatory rate.
5. Because TDI has received few or no complaints over the past 30 years on this issue, the existing remedies of canceling the policy or estimating the payroll appear to be sufficient to compel employers to comply with the policy's payroll audit provision.
6. Applying the changes in *Item B-1429* to new and renewal policies with effective dates on or after 12:01 a.m., January 1, 2017, is not reasonable in Texas.

The commissioner rejects NCCI's filing *Item B-1429—Establishment of Audit Noncompliance Charge*. As a result, the NCCI *Basic Manual*, *Forms Manual*, and *Stat Plan* will display the following statement in place of the language in *Item B-1429*: "This rule does not apply in Texas."



David C. Mattax
Commissioner of Insurance