

No. **2017-5221**

**Official Order
of the
Texas Commissioner of Insurance**

Date: September 19, 2017

Subject Considered:

**Amendments to the
National Council on Compensation Insurance Manual
NCCI Filing *Item B-1433***

The Texas Department of Insurance considers amendments to the National Council on Compensation Insurance *Basic Manual for Workers Compensation and Employers Liability Insurance (Basic Manual)*, proposed in *Item B-1433—Revisions to Manual Rule 1—Classification Assignment and Revisions to Manual Rule 2—Premium Basis and Payroll Allocation* (TDI ECase No. 11699; SERFF Tracking No. NCCI-130670465; August 9, 2016).

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

Findings of Fact

1. NCCI filed *Item B-1433* on August 9, 2016, using the procedure adopted in Commissioner's Order No. 3142 for revisions to NCCI workers' compensation manuals.
2. *Item B-1433* is a national filing. For Texas, *Item B-1433*:
 - a. Amends Rule 1-B-2-c to clarify that Code 8742 excludes district or regional managers who travel between locations of the employer to perform various duties not involving outside sales or collection.
 - b. Amends Rule 1-B-3 by adding "stores and day care services operated by the employer for employee use" to the types of operations that are included under the General Inclusions rule and by updating the description of an employer printing its own products or its own materials for advertising or packaging.
 - c. Amends Rule 1-B-4 by eliminating "employer operated day-care service" from the list of general exclusions.
 - d. Amends Rule 1-B-5 by adding a "Governing Classification Determination Table" to simplify how the governing classification of a business is determined in various situations.

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- e. Amends Rule 1-C-1 to clarify that the "Caption" is the heading or title of the classification and the "Note" is the phrase that follows the caption, and to add the term "phraseology."
- f. Amends Rule 1-C-2 by updating the definition of "Clerical," replacing the Texas Exception's rule definition for "Stories in Height" with NCCI's rule definition, and adding a rule to define "Separate and Distinct Business." NCCI defines a "story" as 15 feet in height, measured from the lowest point above ground level to the highest point above ground level. The Texas Exception defines a "story" as the space in a building between two adjacent floor levels or between a floor and the roof.
- g. Amends Rule 1-D-3-f to add the term "Professional Employer Organization" and change "employee leasing" to "employee leasing firms."
- h. Amends Rule 1-D-5 to clarify that the rule applies to individual locations as well as to the overall business.
- i. Amends the title of Rule 1-D-6 for consistency with the addition of Rule 1-C-2-1.
- j. Amends Rule 1-F-3-b by adding "professional employer organizations," "operations assigned to standard exception classifications," and "general exclusions" to the list of operation types to which the Changes or Corrections in Classifications table does not apply.
- k. Revises the exception to Rule 2-A to accommodate classifications using a premium basis other than per capita.
- l. Amends Rule 2-B to:
 - 1) clarify the meaning of "payroll" and "remuneration."
 - 2) eliminate the inclusion of payments or allowances for hand tools or hand-held power tools used by employees in their work;
 - 3) add employee-authorized salary reductions for health savings accounts and flexible spending accounts to the list of payroll inclusions;
 - 4) increase the maximum amount for expense reimbursements without verifiable receipts.
 - 5) clarify that reimbursement for allowable travel expenses permitted by a government contract are excluded from payroll;
 - 6) include payroll adjustments by the employer to raise employees' wages to federal, state, or local minimum wage, whichever is higher;
 - 7) replace the term "supper money" with "meal money,";
 - 8) add educational assistance and relocation expenses to the list of employer-provided perks that are excluded from payroll; and
 - 9) add health savings accounts and flexible spending accounts to the list of employer contributions to employee benefit plans that are excluded from payroll.
- m. Clarifies that Rule 2-D applies to executive officers, members of LLCs, partners, and sole proprietors and clarifies how overtime pay, partial weeks worked, and bonuses earned impact payroll limitations.

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- n. Amends Rule 2-E to address the treatment of an employee who is not an executive officer during the entire policy period by prorating the payroll limitation based on the number of weeks the employee was an executive officer during the policy period.
 - o. Makes formatting and grammatical changes for clarity.
3. TDI's chief clerk has had copies of the full text of the filing and related exhibits available to the public since the filing date. TDI also made copies of amendments to the filing available to the public as they were received. The filing, amendments to the filing, and all related exhibits are incorporated by reference into this order.
 4. The changes in *Item B-1433* apply to new and renewal workers' compensation policies effective on and after October 1, 2017.
 5. On January 3, 2017, TDI published notice of the filing on its website at www.tdi.texas.gov/rules/2016/nccimanual.html and distributed notice of the filing to its electronic news subscribers.
 6. TDI received one comment and no hearing requests on the filing by the February 6, 2017, deadline.
 7. The commenter generally supported the changes in *Item B-1433*.
 8. The commenter stated that the proposed amendment to "Rule 1-B-2-c to delete 'messengers' in the Texas exception title implies that NCCI desires to reassign messengers from Code 8742 to Code 7380." The commenter expressed concern that the change would create ambiguity and "classification limbo" if "messengers" was deleted from Code 8742 and not added to Code 7380. The commenter also expressed concern that several Texas Exception classifications under Code 8742 include the term "messengers," and suggested changes to clarify the intent of the classification.
 9. To avoid confusion, both TDI and NCCI agree that the word "messengers" should be included in the caption of Code 8742.
 10. The commenter also stated that the table added to Rule 1-B-5 clarifying how a governing class is determined is unclear and does not address all possibilities, especially for unexpired policies. The commenter stated that the rule change introduces possible premium disparity merely because of the existence of a classification on the policy and asked what the governing code would be if the estimated payrolls in two basic class codes are identical.
 11. TDI agrees with the commenter that the "governing classification determination table" on page 11, Exhibit 2 is confusing. The proposed method for determining a governing classification is unclear and inconsistent with the way Texas has historically interpreted and applied governing classification codes. The table includes some scenarios that are not consistent with how TDI determines governing classification codes. The governing classification code in Texas is the code that produces the greatest amount of payroll.
 12. Additionally, by providing only examples, and no specific rule, the table leaves out various possible scenarios, which can create confusion and an unbalanced application of the rule.

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Therefore, Texas will not adopt the "governing classification determination table" as published. TDI adopts Rule 1-B-5 with changes to retain the existing Texas State Exception for Rule 1-B-5 "Governing Classification" as reflected in revised Exhibit 10 on page 62.

13. Revised Exhibit 10 is incorporated by reference into this order.

Conclusions of Law

1. The commissioner has jurisdiction over this matter under Insurance Code Article 5.96 and §§2051.002, 2051.201, 2052.002, 2053.051, 2053.053, 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 amendments to the *Basic Manual for Workers Compensation and Employers Liability*, as approved in this order, to new and renewal workers' compensation policies effective on and after October 1, 2017, are reasonable and consistent with Texas workers' compensation statutes and rules.
5. TDI modifies the filing to retain the word "messengers" in the caption for Code 8742 in Rule 1-B-2-c.
6. TDI declines to adopt the "governing classification determination table" as requested by NCCI. The commissioner adopts Rule 1-B-5 with changes to retain the existing Texas State Exception for Rule 1-B-5 Governing Classification as reflected in revised Exhibit 10 on page 62. The revised Exhibit 10 is incorporated by reference into this order.

TDI approves NCCI's filing, *Item B-1433—Revisions to Manual Rule 1—Classification Assignment and Rule 2—Premium Basis and Payroll Allocation*, revised as stated above, for new and renewal workers' compensation policies effective on and after October 1, 2017.



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Texas Department of Insurance
Delegation Order 4506