

**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

In Re: The Mental Health Center of Southern NH, dba CLM Center of Life Management

Docket No.: Ins 17-006-AP

**PROPOSED DECISION AND ORDER ON THE MERITS OF THE APPEAL
FILED BY THE MENTAL HEALTH CENTER OF SOUTHERN NH,
DBA CLM CENTER OF LIFE MANAGEMENT**

I. OVERVIEW

These proceedings before the New Hampshire Insurance Department (“Department”) were initiated by the Petitioner, The Mental Health Center of Southern NH, dba CLM Center of Life Management (“CLM”). (Not. of Hr’g, dated 2/23/17.) CLM initiated these proceedings by filing a Petition with the Department. (Not. of Hr’g, dated 2/23/17; CLM Petition.) In the Petition, CLM appeals a decision (“decision”) that the New Hampshire Workers Compensation Classification and Rating Appeal Board (“Board”) issued on January 9, 2017, relative to the governing basic classification code used in two workers’ compensation policies that New Hampshire Employer’s Insurance Company (“AIM”) had issued to CLM in the voluntary market. (CLM’s Pet.; Not. of Hr’g, dated 2/23/17.) AIM and National Council on Compensation Insurance, Inc. (“NCCI”) are also parties in this matter. The hearing on CLM’s appeal was held on May 14, 2018.

The dispute at issue in this appeal concerns AIM’s use of NCCI classification code 8864—the “Social Services Organization” code—as the governing basic classification code in two workers’ compensation policies that AIM issued to CLM in the voluntary market.¹ (CLM Pet.) CLM argues that AIM is required to retroactively apply NCCI classification code 8832—the Physician and Clerical code—as the governing basic classification code to the following two policies: (1) policy number ECC4000084012011, with effective dates of October 1, 2011 to October 1, 2012 (“2011/2012 policy”); and (2) policy number ECC4000084012012, with effective dates of October 1, 2012 to October 1, 2013 (“2012/2013 policy”). (CLM Pet.) CLM sought the retroactive application of the 8832 classification code to the 2011/2012 and 2012/2013 policies following the issuance of an NCCI Inspection and Classification Report on April 9, 2014 (“2014

¹ CLM does not dispute the applicability of the 8842 classification code to its Group Home Operations. See CLM’s Legal Memorandum, dated 8/08/17, p. 2 n.2; see also Appeal Hearing Transcript, pp. 34-35, p. 36, lines 1-2 (hereinafter the appeal hearing transcript is referred to in condensed format, e.g., “Tr. Appeal Hr’g 34-35, 36:1-2.”)

NCCI Report”). (CLM Ex. 9.)² The 2014 NCCI Report determined that the 8832 code was the classification code applicable to CLM’s operations and, consequently, that the 8864 code and its accompanying 8810 code for “Clerical Office Employees NOC” should be deleted because the 8832 code “includes clerical employees.” (CLM Ex. 9.) Subsequent to the issuance of the 2014 NCCI Report, AIM revised the workers’ compensation policy that was then in effect—policy number ECC-600-4000084-2013A with effective dates of October 1, 2013 to October 1, 2014³—to use the 8832 Code “because Code 8832 was a lower rated classification than Code 8864.” (CLM Ex. 15.) After making the classification code changes to the 2013/2014 policy based upon the 2014 NCCI Report, AIM provided a refund to CLM relative to that policy for overcharged premium. (CLM 39:10-12.)

CLM filed this appeal after the Board held a meeting on the dispute and issued a decision that AIM did “not have to ‘go back’ and revise the audit for the policy effective 10/1/2012.” (CLM Ex. 15.) The Board’s decision on this issue further provides: “There is no NCCI rule directing a carrier to retroactively apply classification changes.” (CLM Ex. 15.) AIM and NCCI maintain that AIM has no obligation to revise the 2011/2012 or 2012/2013 policy to retroactively use code 8832 as the governing classification code.

Based upon the evidence presented at the appeal hearing, I find that CLM has met its burden of proving by a preponderance of the evidence that AIM is obligated by NCCI Basic Manual Rule 1-F-2 to apply the 8832 classification code retroactively to the inception of the 2011/2012 and 2012/2013 policies. This ruling is consistent with and required by RSA 412:35, I, which mandates that the final premium an insurer charges for workers’ compensation policies issued in New Hampshire be “based upon [the] actual exposure existing during the term of the policy coverage.” RSA 412:35, I.

II. PROCEDURAL HISTORY

CLM filed its appeal with the New Hampshire Insurance Department on February 7, 2017. (Not. of Hr’g, dated 2/23/17.) The original Notice of Hearing issued in this matter on February 23, 2017 included a finding that the filing of the Petitioner’s appeal was timely. (Not. of Hr’g, dated 2/23/17.) In reaching that conclusion, Commissioner Sevigny noted that CLM had filed its appeal with the Department within thirty days of the Board’s decision in compliance with the New Hampshire’s Operational Rules for the Workers Compensation Insurance Plan. (Not. of Hr’g, dated 2/23/17.) The original Notice of Hearing also indicates that CLM’s appeal is properly before the Department because it was filed in accordance with New Hampshire’s Operational Rules for the Workers’ Compensation Insurance Plan. (Not. of Hr’g, dated 2/23/17.)

² Where possible, such as in this instance, this Proposed Decision and Order references copies of documents that were admitted as full exhibits at the hearing on the merits of CLM’s appeal that was held on May 14, 2018.

³ CLM Ex. 8.

Commissioner Sevigny entered an Order on February 24, 2017, appointing me as the Hearing Officer in this matter. (Order, dated 2/24/17.)

I issued an Order on July 10, 2017, to correct Paragraph 3 of the original Notice of Hearing with regard to the policies at issue in this appeal. (Order, dated 7/10/17.) The July 10, 2017, Order clarified that the scope of this appeal is limited to the workers' compensation policies that AIM issued to CLM with the effective dates of October 1, 2011 to October 1, 2012 and October 1, 2012 to October 1, 2013. (Order, dated 7/10/17.) I issued the July 10, 2017 Order in part in response to an allegation raised in the Motion to Dismiss AIM filed in this matter. (Order, dated 7/10/17.) In particular, I issued the July 10, 2017 Order in response to an allegation in AIM's Motion to Dismiss that the original Notice of Hearing contained an error with regard to the particular insurance policies at issue in this appeal. (AIM's MTD.) I treated that portion of AIM's Motion to Dismiss as a motion to correct the original Notice of Hearing. (Order, dated 7/10/17.) The July 10, 2017 Order substantively granted the request to correct the scrivener's error that AIM had made in its Motion to Dismiss. (Order, dated 7/10/17.) The July 10, 2017 Order also required each party to submit a memorandum of law to explain its legal positions in this matter. (Order, dated 7/10/17.) Each party submitted a memorandum of law in accordance with the July 10, 2017 Order and related orders.

AIM raises statute of limitations and subject matter jurisdiction as two alleged grounds for dismissal in its Motion to Dismiss. (AIM MTD, dated 5/15/17.) Although the hearing on the statute of limitations portion of AIM's Motion to Dismiss was held on November 1, 2017, I issued an Order on December 6, 2017, explaining that the decision on those two issues in AIM's Motion to Dismiss had to be deferred because the issues could not be decided until after the evidentiary hearing on the merits of CLM's appeal had been held. (Orders, dated 12/6/17 and 12/29/17.) A hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss was held on May 14, 2018 shortly after the hearing on the merits of CLM's appeal, which was also held on May 14, 2018. The parties were notified of the date and times for the May 14, 2018 hearings pursuant to Orders issued on April 11, 2018 and May 4, 2018. (Orders dated 4/11/18 and 5/04/18.) I have issued an Order on the subject matter jurisdiction and statute of limitations issues portions of AIM's Motion to Dismiss on this same date, July 11, 2018, denying AIM's requests for dismissal. (Order on AIM's MTD, dated 7/11/18.) The July 11, 2018 Order on AIM's Motion to Dismiss is hereby incorporated by reference.

Prior to the hearings on May 14, 2018, each party filed a motion for summary judgment. I entered an order on December 6, 2017, denying each party's motion for summary judgment. (Orders, dated 12/6/17 and 12/29/17.) I denied each party's motion for summary judgment concluding in each instance that the entry of summary judgment was precluded due to: (1) the

existence of genuine issues of material fact; (2) lack of affidavit; and (3) the party's lack of entitlement to summary judgment as a matter of law. (Order, dated 12/06/17.)

In addition to the appeal hearing and the hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss held on May 14, 2018, a hearing was held in this matter on November 1, 2017 on the statute of limitations arguments raised in AIM's Motion to Dismiss. Two prehearing conferences were also held in this matter. The first prehearing conference was held on May 4, 2017. (Order, dated 5/08/17.) The second prehearing conference was held on August 15, 2017. (Order, dated 8/21/17.) For the reasons explained in the record, a number of continuances and filing/deadline extensions were entered in this matter. It is also noted that the parties engaged in limited discovery in the course of this appeal. (Order, dated 6/09/17.)

A hearing on the merits of CLM's appeal ("appeal hearing") was held on May 14, 2018. The appeal hearing was recessed and the record left open to allow the parties to make additional submissions. In accordance with the notification that I had provided to the parties at the hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss, which was also held on May 14, 2018, I issued an Order after the appeal hearing and hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss to close the record in each hearing. (Tr. Hr'g on MTD SMJ Issue 15:7-9.) I issued the Order closing the appeal hearing and hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss on June 6, 2018. (Order, dated 6/06/18.) Per the June 6, 2018 Order, the record closed in the appeal hearing and the hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss on June 6, 2018. (Order dated, 6/06/18.) The record was kept open longer than had been anticipated at the May 14, 2018 appeal hearing and the May 14, 2018 hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss because the Department received the stenographic transcripts of those hearings—the official record of those hearings—later than expected. (Order dated 6/06/18.) No party made any filing subsequent to the issuance of the June 6, 2018 Order.

Each party was represented by counsel at the appeal hearing. In particular, at the appeal hearing: Attorney Donald Lee Smith represented CLM; Attorney Michael S. Lewis represented AIM; and Attorney Nathan R. Fennessy represented NCCI.

At the May 14, 2018 appeal hearing, each party was provided with the opportunity to offer testimony, cross-examine witnesses, offer evidence and present argument. Five witnesses testified at the appeal hearing: Michael Bergeron (called by CLM); James Keenan (called by CLM); Deborah Stone (called by AIM); Daniel Landers (called by AIM); and Maureen Longanacre (called by NCCI). Testimony of these witnesses was allowed or disallowed as set forth in the record. (Tr. Appeal Hr'g 20-250.)

The appeal hearing lasted approximately five hours and fifteen minutes. It was recorded both by audio device and by a certified court reporter. AIM made arrangements for the certified court reporter to be present at the appeal hearing and at the hearing on the subject matter jurisdiction portion of AIM's Motion to Dismiss. The transcription made by the certified court reporter is the official record of the appeal hearing. (Tr. Appeal Hr'g 9:19-23-10:1.)

On May 11, 2018 prior to the appeal hearing, CLM submitted an Assented-to Motion for Full Admission of Exhibits. In the Motion, CLM requested that with the exception of CLM Exhibits 20 through 23 that each of the exhibits, each of which had been pre-marked for identification, that each party had submitted prior to appeal hearing be admitted as full exhibits. CLM represented in the Motion that counsel for AIM and NCCI assented to the relief requested in the Motion. CLM's Motion was taken up at the beginning of the appeal hearing. I orally GRANTED CLM's Motion at the appeal hearing. As a consequence of my ruling on CLM's Motion, CLM Exhibits 1-19, AIM Exhibits 1-16, and NCCI Exhibits A-E were admitted as full exhibits early on during the appeal hearing. During the course of the appeal hearing, I later admitted CLM Exhibits 20, 21, 22, and 23 as full exhibits finding each to be relevant to the issues raised in the appeal. The effect of these evidentiary rulings was that each of the exhibits, which had been pre-marked for identification purposes and submitted prior to the commencement of the hearing on CLM's appeal, was entered as a full exhibit on the record of the appeal hearing. Each party's exhibits are listed in the exhibit list it filed in this matter. The exhibits are also identified in the stenographic transcript of the appeal hearing. (Tr. Appeal Hr'g 4-6.)

This proceeding is governed by the provisions of the New Hampshire Administrative Procedure Act, RSA 541-A, as well as New Hampshire Code of Administrative Rules Ins 200. (Not. of Hr'g, dated 2/23/17.) With respect to evidence received in the proceeding, all evidence must be relevant to the issues presented. See RSA 541-A:33, II; Ins. 203.01(d)(4). All evidence admitted in this matter met this standard. (Tr. Appeal Hr'g 7-10.)

III. SUMMARY OF ISSUES

The primary issue in this matter is whether AIM is obligated to retroactively replace the 8864 classification code with the 8832 classification code as the governing classification code in the 2011/2012 and 2012/2013 policies it issued to CLM.

IV. BURDEN OF PROOF

CLM carries the burden of proof in this matter because it is the appealing party. Ins 204.05(f). Under Ins 204.05, CLM must establish that it is entitled to the relief it seeks in this appeal by a preponderance of the evidence. Ins 204.05(f). Within the meaning of Ins 204.05, "proof by a preponderance of the evidence" means that "what is sought to be proved is more probable than not." Ins 204.05(a).

V. STANDARD OF REVIEW

The Department reviews the issues that the Petitioner raises in this appeal on a *de novo* basis. Accordingly, the Hearing Officer does not give any deference to the factual findings or legal rulings made by the Workers Compensation Classification and Rating Appeal Board (“Board”). All factual findings in this appeal are made *de novo* based upon the evidence that the parties presented at the May 14, 2018 appeal hearing.

VI. FACTS

I find that the record establishes the following relevant facts:

A. BACKGROUND

CLM is a Community Mental Health Center (“CMHC”). (Tr. Appeal Hr’g 22:1-4.) It provides mental health services to patients in New Hampshire. (Tr. Appeal Hr’g 21:15-23; CLM Ex. 9.) CLM employs medical doctors, licensed clinical social workers, psychiatrists, psychologists, master’s clinicians, nurse practitioners with training in psychiatry, and bachelor’s level counselors. (Tr. Appeal Hr’g 22:10-18.) CLM is one of ten CMHCs in the State of New Hampshire. (Tr. Appeal Hr’g 22:5-6.)

In 2009, AIM issued a workers’ compensation policy, with a policy period of October 1, 2009 to October 1, 2010, to CLM in the voluntary market. (Tr. Appeal Hr’g 26:18-23, 27:1-7, 156:15-20; CLM Ex. 2.) The 2009 policy, which had a policy number of WMZ 8006128012009, used NCCI workers’ compensation classification code 8864 (“8864 code”), which is the “Social Services Organization – All Employees & Salespersons, Drivers” code,⁴ as the governing classification code. (CLM Ex. 2.) The use of the 8864 code as the primary classification code in the 2009 policy, stemmed from an NCCI inspection report issued on June 1, 2009, which identified 8864 as the primary classification code for CLM. (Tr. Appeal Hr’g 151:16-23, 152:1-19.) At the time that NCCI issued the inspection report in 2009, CLM received its workers’ compensation coverage in the voluntary market from Technology Insurance Company. (CLM Ex. 1.)

Subsequently, AIM issued additional workers’ compensation policies to CLM in the voluntary market. (Tr. Appeal Hr’g 68:7-21, 156:9-20.) The additional workers’ compensation policies AIM issued to CLM in the voluntary market had policy periods of: (1) October 1, 2010 to October 1, 2011 (“2010/2011 policy”); (2) October 1, 2011 to October 1, 2012 (“2011/2012 policy”); (3) October 1, 2012 to October 1, 2013 (“2012/2013 policy”); and (4) October 1, 2013 to October 1, 2014 (“2013/2014 policy”). (CLM Exhibits 4, 6, 8.) Until NCCI issued an inspection

⁴ CLM Ex. 15.

report on April 9, 2014, every workers' compensation policy AIM issued to CLM used 8864 as the governing basic classification code. (CLM Exhibits 4, 6, 8, 15.)

AIM auditor Frank Cataldo prepared audit reports for the 2011/2012 and 2012/2013 policies following the expiration of those policies. (CLM Exhibits 5, 7.) The initial audit report AIM prepared for the 2011/2012 policy is dated November 8, 2012 and uses the 8864 classification code. (CLM Ex. 5.) As for the initial audit report AIM prepared for the 2012/2013 policy, it is dated November 6, 2013 and uses the 8864 classification code. (CLM Ex. 5)

In 2014, CLM requested that NCCI conduct an inspection to assess whether its services could be classified under the 8832 classification code. (Tr. Appeal Hr'g 32:21-23, 33:1-19; CLM Ex. 9.) NCCI inspected CLM relative to this issue on March 20, 2014. (Tr. Appeal Hr'g 20-21; CLM Ex. 9.) NCCI issued an Inspection & Classification Report ("2014 NCCI Report") subsequent to the March 20, 2014 inspection. (CLM Ex. 9.) From the information contained within the 2014 NCCI Report, it appears that the NCCI inspector was at CLM's premises for the inspection for about an hour. (CLM Ex. 9.) The 2014 NCCI Report identifies the policy that was in effect at the time of the March 2014 inspection as policy number ECC60040000842013A with an effective date of October 1, 2013. (CLM Ex. 9.)

The 2014 NCCI Report identifies "Mental Health Counseling" as CLM's principal business type. (CLM Ex. 9.) In relation to this determination, the 2014 NCCI Report concluded that the 8832 classification code should be used for CLM's operations instead of the 8864 classification code and, therefore, that both the 8864 code and the 8810 code should be deleted and replaced with the 8832 code. (CLM Ex. 9.) The 2014 NCCI Report provides in pertinent part on this issue as follows:

It was determined that classification code 8832 is applicable to the operations conducted by CLM and that classification code 8864 should be deleted. Outpatient clinics in which the insured provides counseling services for clients with mental health or substance abuse issues are classified to Code 8832. The primary operation of CLM is to provide mental health counseling to their clients.

Classification code 8810 is deleted as code 8832 includes clerical employees.

(CLM Ex. 9.)

The 2014 NCCI Report contains a section entitled "CLASSIFICATION CHANGES". (CLM Ex. 9.) The "CLASSIFICATION CHANGES" section of the report contains the following question: "Has there been a change in business operations in the last four years that would affect a basic classification change?" (CLM Ex. 9.) The response provided in the report in relation to that

question in the report is: “No”. (CLM Ex. 9.) The “CLASSIFICATION CHANGES” section in which the question appears provides in substance as follows:

CLASSIFICATION CHANGES		
Governing Class Code Change? Yes	From Code: 8864	To Code: 8832
Has there been an ownership change in the last 5 years? No If yes explain:		
Is the company related to any other business by common ownership? No If yes explain:		
Has there been a change in business operations in the last four years that would affect a basic classification change? No If yes explain:		

(CLM Ex. 9, emphasis added.)

By letter dated September 30, 2015, CLM apprised AIM of its opinion that the 2014 NCCI Report obligated AIM to revise the audits that had been done for the 2011/2012 and 2012/2013 policies. (CLM Ex. 10.) CLM maintained in the letter that the 8832 classification code was the correct code to be used in the 2011/2012 and 2012/2013 audits with the consequence that the 8864 and 8810 codes should be removed and the wages reassigned to the 8832 classification code. (CLM Ex. 10.) The record also establishes that AIM’s auditor, Frank Cataldo, communicated directly with CLM about the revision of the classification codes used in the audits that AIM had done for the 2011/2012, 2012/2013, and 2013/2014 policies. (CLM Ex. 11.) AIM, however, refused to issue a premium adjustment for the 2011/2012 or the 2012/2013 policies as CLM had requested. (CLM Ex. 12, Email from AIM’s J. MacDougall to R. Hajer of Stephenson & Brook dated 12/15/15.)

Thereafter, CLM, through its consultant, Ruth Hajer of Stephenson & Brook, sought review of the issue through the NCCI dispute resolution process that exists for New Hampshire policyholders under the New Hampshire Miscellaneous Rules of the NCCI Basic Manual. (CLM Ex. 13, Email from R. Hajer to L. Backus Hall dated 2/17/16; Tr. Appeal Hr’g 47:3-23, 48:1-12.) NCCI accepted the dispute. (CLM Ex. 13, Email from L. Backus Hall to R. Hajer dated 2/24/16; CLM Ex. 15; Tr. Appeal Hr’g 13-15) The New Hampshire Workers Compensation Classification and Rating Appeals Board (“Board”) held a meeting on the dispute on December 13, 2016. (CLM Ex. 15.) As explained herein above, the Board entered a decision on January 9, 2017, that AIM had no obligation to retroactively replace the 8864 classification code used in the 2012/2013 policy with the 8832 code. (CLM Ex. 15.) In reaching its decision, the Board rationalized that:

“There is no NCCI rule directing a carrier to retroactively apply classification changes.” (CLM Ex. 15.) It seems unlikely that the Board had copies of the revised audit reports for the 2011/2012 policy or the 2012/2012 policy at the time it held the meeting or entered its decision on the dispute at issue in this matter whereas the evidence at the appeal hearing established that AIM did not provide copies of the revised audit reports to CLM until the discovery phase of this appeal. (Tr. Appeal Hr’g 51:21-23, 52:1-10, 181:13-20.)

B. CLASSIFICATION CODES

The NCCI Scopes Manual provides written descriptions/explanations of NCCI Classification Codes. Relative to the 8864 and 8832 codes at issue in this matter, the Scopes Manual provides the following pertinent explanation/description of these codes:

8864 Classification Code (Posted March 1, 2014):⁵

With respect to the 8864 classification code, which is known as the Social Services Organization – All Employees & Salespersons Drivers code, the Scopes Manual provides in part:

Note:

Applicable to institutions that provide social services to mentally, physically or emotionally challenged persons. Social service organizations may offer these individuals sleeping accommodations, meals, on-site counseling or client assessments, education, training, and employment and offer limited medical services such as first aid. Includes employees who may, among other services, counsel, advise, guide, direct, or instruct clients. Refer to Code 8842 for group homes, group foster homes, halfway houses that provide rehabilitation services, shelters, and independent supportive living homes for mentally, physically or emotionally challenged individuals. Refer to Code 7720 for juvenile detention centers, “boot camps,” and halfway houses for convicts. Detoxification, treatment, and rehabilitation of alcoholics or narcotic addicts are separately rated to the appropriate hospital classification codes. Separately rate business ventures operated by social service organizations.

Description:

Code 8864 applies to institutions that provide charitable, welfare, or social services to mentally, physically, or emotionally challenged persons, troubled youth, children in crisis, abused persons, persons with financial and employment hardships, and individuals performing drug- or alcohol-related community service. Charitable, welfare,

⁵ The March 1, 2014 version of the Scopes Manual was used relative to this Code. To the extent there are differences between this version and earlier versions dating back to 2009, the Hearing Officer did not find those differences to be significant relative to this appeal.

or social service organizations may offer these individuals meals, on-site counseling, case management or client assessments, education, vocational training, and employment. Risks classified to Code 8864 may offer limited medical services such as first aid but not significant medical treatment typically found in hospitals.

Employees assigned to Code 8864 include but are not limited to counselors; resource and referral specialists; case managers who coordinate services of organizations to benefit an individual or family; volunteer coordinators; outside welfare workers; classroom teachers who teach or demonstrate in a classroom environment; cooks; drivers; housekeepers; laundry, security, and maintenance personnel; and medical professionals such as physicians and nurses.

8832 Classification Code (Posted March 1, 2014):⁶

With regard to the 8832 classification code, which is identified as the “Physician & Clerical” code, the Scopes Manual provides in part:

SCOPE Code 8832 is primarily intended to apply to medical providers that operate in a typical doctor’s office environment. The classification contemplates physicians, dentists, other employees providing medical services, domestics or other maintenance personnel engaged exclusively in cleaning or maintaining the portion of an insured’s premises used for professional purposes and clerical office employees. Code 8832 contemplates clerical operations, whether performed in the physician’s office or elsewhere, such as in a centralized location completely separate and apart from the areas where professional services are performed. Employees of a physician’s office that is located in a hospital, who are employed by the physician and not employed by the hospital, are properly classified to Code 8832.

* * *

Outpatient mental health clinics where full-time or part-time psychologists and social workers interview and counsel patients have also been considered within the scope of this classification.

* * *

Insureds that engage in speech therapy, physical therapy, weight control service, and other medical or physical service-type risks that render their services in their offices are

⁶ The March 1, 2014 version of the Scopes Manual was used relative to this Code. To the extent there are differences between this version and earlier versions dating back to 2008, the Hearing Officer did not find those differences to be significant relative to this appeal.

additionally classified to Code 8832. This code is applicable to these insureds even though they may travel to clients, provided that these insureds also maintain an office to see clients. In the event these insureds do not maintain an office to see clients but exclusively travel to residences of their clients to provide services, Code 8835 is assigned to their operations by analogy.

Satellite dispensaries, emergency medical treatment facilities and clinics operated by a hospital on its premises are considered incidental to the hospital's operation and are properly classified to the hospital codes, 8833 and 9040. Facilities of this nature away from a hospital's premises, which do not provide overnight accommodations, are classified as Code 8832.

C. WITNESS TESTIMONY

At the appeal hearing, the parties' witnesses offered testimony including the following relevant testimony:⁷

Michael Bergeron

CLM's Chief Financial Officer, Michael Bergeron, testified on CLM's behalf at the appeal hearing. (Tr. Appeal Hr'g 19-103.) Mr. Bergeron has been employed by CLM for thirty years, eighteen of which he has served as its chief financial officer. (Tr. Appeal Hr'g 20:17-23, 21:1-14.) In his position as CFO, Mr. Bergeron oversees all of CLM's financial matters and its operations. (Tr. Appeal Hr'g 21:5-8.)

With regard to CLM's operations, Mr. Bergeron testified that the only significant change that CLM had between the NCCI inspection in 2009 and the NCCI inspection in 2014 was the closure of a group home. (Tr. Appeal Hr'g 32:17-20, 35:1-7, 98-100.) He maintains that CLM provided the same kind of mental health services throughout that period but acknowledges there have been some changes with respect to locations where the services are provided. (Tr. Appeal Hr'g 35:5-7, 88-92, 98:10-23, 98-100.)

Mr. Bergeron testified that he formulated the belief that CLM should be classified under code 8832 instead of code 8864 in part due to his interactions with the chief financial officers of other community health centers in New Hampshire. (Tr. Appeal Hr'g 24:11-15, 41:4-16, 49:8-21.) Further, Mr. Bergeron testified that he believes that the 8832 code most accurately describes the services CLM provides and, thus, is the correct classification code for CLM. (Tr. Appeal Hr'g 38:5-14.) He further testified that to the extent that CLM was classified under the 8864 code that it was improperly classified because the type of services it had provided during

⁷ Please see the appeal hearing transcript for the complete testimony of each witness.

the entire time it was insured under the workers' compensation policies issued by AIM had not changed apart from the closure of a single group home. (Tr. Appeal Hr'g 24-41, 55.)

With respect to the events that occurred after the issuance of the 2014 NCCI Report, Mr. Bergeron testified that AIM's auditor, Frank Cataldo, had communicated to CLM that he had reviewed the audits for the 2011/2012, 2012/2013, and 2013/2014 policies and based upon that review that adjustments were in progress. (Tr. Appeal Hr'g 41-45, 51-52.) CLM did not see the revised audits that AIM had prepared for the 2011/2012 and 2012/2013 policies until AIM produced them to CLM in discovery in the course of this appeal. (Tr. Appeal Hr'g 51:21-23, 52:1-10.) Mr. Bergeron did not recall CLM ever having received audit reports from AIM. (Tr. Appeal Hr'g 55:18-23.)

CLM learned from AIM's John MacDougall that AIM was not going to refund premium to CLM for the 2011/2012 or 2012/2013 policy due to its belief that NCCI did not require it to do so. (Tr. Appeal Hr'g 45:15-23, 46, 47:1-2.) After CLM's efforts to resolve the dispute directly with AIM failed, CLM sought to resolve the dispute through the NCCI dispute resolution process. (Tr. Appeal Hr'g 47-49.) After receiving the Board's decision that AIM did not have to retroactively apply the classification codes identified in the 2014 NCCI Report, CLM appealed the Board's decision to the Department. (Tr. Appeal Hr'g 50-51.)

James Keenan

James Keenan testified as an expert witness on CLM's behalf. (Tr. Appeal Hr'g 103-149.) Mr. Keenan is self-employed at a company he has owned since 1997 called Workers' Compensation Audit Specialists. (Tr. Appeal Hr'g 103:20-23, 138-141.) In that capacity, clients hire him to analyze whether they were charged the proper workers' compensation premium. (Tr. Appeal Hr'g 104:4-10.) Many years ago he conducted inspections for NCCI as an independent contractor. (Tr. Appeal Hr'g 142-143.)

In the summer of 2016, Stephenson & Brook, a risk management company focusing on premium disputes and claims, hired Mr. Keenan to work as an independent contractor to assist with CLM's classification/premium dispute with AIM. (Tr. Appeal Hr'g 105:17-23, 106, 107:1-12, 138:6-23.)

Mr. Keenan concluded, based upon all information and materials available to him, that: (1) CLM had been misclassified in two policies at issue that used the 8864 code because the 8832 code most closely describes CLM's business operations; and (2) CLM was entitled to refund for those policies pursuant to the Basic Manual rule pertaining to corrections in classifications that result in a decrease in premium and New Hampshire law. (Tr. Appeal Hr'g 106-114, 127-137.) Mr. Keenan explained that CLM would be entitled to a refund if the 8832 code were used instead of the 8864 code in the two policies at issue because the 8832 code is a "lower-rated"

classification and, thus, would result in a decrease in premium. (Tr. Appeal Hr'g 107-110, 116:22-23, 117:1-3.)

With respect to audits, Mr. Keenan testified that an insured's operations are reviewed at audit as part of determining if the correct classification code has been assigned to the insured (Tr. Appeal Hr'g 126:4-16.) Mr. Keenan prepared a calculation of what he believes CLM would be entitled to relative to a refund if the 8832 code was used instead of the 8864 code as the governing classification in the 2011/2012 and 2012/2013 policies. (Tr. Appeal Hr'g 117-124.) AIM and NCCI do not accept Mr. Keenan's calculations, challenging both reliability of his data and his methodology. (Tr. Appeal Hr'g 117—119, 237-240.)

Daniel Landers

At the appeal hearing, Daniel Landers testified on behalf of AIM. (Tr. Appeal Hr'g 149-184.) Mr. Landers is employed by AIM Mutual Insurance Company ("AIM"). (Tr. Appeal Hr'g 150:2-3.) He has worked for AIM for sixteen years. (Tr. Appeal Hr'g 150:5.) For the past two years, he has been responsible for all field operations for AIM in his capacity as director of field operations. (Tr. Appeal Hr'g 150:7-13.) Prior to that, he worked for approximately fourteen years as AIM's regional underwriting manager for New Hampshire. (Tr. Appeal Hr'g 150:14-20.)

Mr. Landers testified that AIM is a workers' compensation insurance company domiciled in Massachusetts that does business in four states, including New Hampshire. (Tr. Appeal Hr'g 150:21-23.) He testified that AIM only writes business in the voluntary market in New Hampshire. (Tr. Appeal Hr'g 156:15-17.)

With respect to CLM, Mr. Landers testified that AIM issued workers' compensation policies to CLM from 2009 to 2014. (Tr. Appeal Hr'g 151:7-15.) He testified that AIM non-renewed CLM effective October 1, 2014 because it no longer wanted to do business with CLM. (Tr. Appeal Hr'g 151:14-15.) According to Mr. Landers, AIM no longer wanted to do business with CLM because it determined that it would not be profitable to do so in light of the reduction in premium resulting from the use of the 8832 code. (Tr. Appeal Hr'g 151:11-15, 160:14-23, 161:1-4.)

When AIM began insuring CLM, it did so using the 8864 classification code due to information AIM had received from CLM's insurance broker about a prior NCCI inspection. (Tr. Appeal Hr'g 152-154.) According to Mr. Landers, CLM did not challenge the use of the 8864 code with AIM until after the NCCI issued the Inspection and Classification Report in 2014. (Tr. Appeal Hr'g 154-155, 166-167.)

Mr. Landers testified that following the issuance of the 2014 NCCI Report that AIM retroactively changed the classification code used in the policy that was then in effect, the

2013/2014 policy, from 8864 to 8832 back to the policy's inception. (Tr. Appeal Hr'g 172:2-12.) He testified that due to the retroactive classification code change in the 2013/2014 policy that the premium for that policy was greatly reduced because the rate for the 8832 code was significantly less than the rate for the 8864 code. (Tr. Appeal Hr'g 172:10-21.)

Mr. Landers testified that AIM auditor Frank Cataldo prepared the revised audit reports for the 2011/2012 and 2012/2013 policies after CLM had contacted AIM about whether the original audit reports for those policies could be revised in light of the 2014 NCCI Report. (Tr. Appeal Hr'g 172-173.) Mr. Cataldo, the same auditor who had prepared the original audits for the 2011/2012 and 2012/2013 policies, prepared revised audit reports for the 2011/2012 and 2012/2013 policies. (Tr. Appeal Hr'g 172-173.) Per Mr. Landers' testimony, the revised audit reports for the 2011/2012 and 2012/2012 policies did not become "official" and were never "issued" because AIM did not release a check to the insured in relation to the audits. (Tr. Appeal Hr'g 182:16-23.) In addition, Mr. Landers testified that AIM did not "issue" or make the revised audit reports for the 2011/2012 or 2012/2013 policy "official" because its management decided that NCCI rules did not require it to have revised those audits or to have conducted a re-audit. (Tr. Appeal Hr'g 173-178, 181-183.) Mr. Landers testified that the two revised audits had the potential to result in "significant return of premium." (Tr. Appeal Hr'g 182:3-4.)

Deborah Stone

AIM called Deborah Stone as an expert witness in this matter. (Tr. Appeal Hr'g 184-204.) Ms. Stone is self-employed as "a consultant in insurance actuarial risk management and general business" at a consulting firm known as Stone Business and Risk Consulting. (Tr. Appeal Hr'g 184:20-23.) Ms. Stone's prior employment included time as an employee of the New Hampshire Insurance Department. (Tr. Appeal Hr'g 185-186.) Ms. Stone held a variety of different titles over the course of her employment at the Department. (Tr. Appeal Hr'g 185.)

Ms. Stone provided general testimony about workers' compensation insurance and about the classification code system. (Tr. Appeal Hr'g 184-204.) In addition, Ms. Stone testified about insurer reliance upon NCCI promulgated classifications. (Tr. Appeal Hr'g 188.) Her testimony also established that while insurers may rely upon NCCI promulgated classifications that insurers are sometimes the ones making the classification selection. (Tr. Appeal Hr'g 193-194.) In fact, she agreed that there was nothing that prevents an auditor from changing a classification code. (Tr. Appeal Hr'g 200:18-22.)

The testimony of Ms. Stone also touched up the subject of the alleged market impact of allowing classification code changes to be made retroactively. (Tr. Appeal Hr'g 196.) She testified that she believed that retroactive classification code changes could cause: (1) rates for

workers' compensation insurance to increase; and (2) business in the residual market to increase. (Tr. Appeal Hr'g 198.)

With respect to workers' compensation policies generally, Ms. Stone agreed that workers' compensation policies in New Hampshire are required by law to be issued on an auditable basis. (Tr. Appeal Hr'g 205-206.) She also agreed that the purpose of audits is to ensure that the amount of premium charged is appropriate, including based upon the classifications. (Tr. Appeal Hr'g 199.)

Maureen Longanacre

Maureen Longanacre testified for NCCI at the appeal hearing. (Tr. Appeal Hr'g 206-255.) She is employed by NCCI as an underwriting dispute consultant. (Tr. Appeal Hr'g 207:9.) She has worked for NCCI for fifteen years. (Tr. Appeal Hr'g 207:6-7.)

Ms. Longanacre provided general testimony about NCCI and its services. (Tr. Appeal Hr'g 207-209.) She testified that classification code disputes are "very common" and explained how the NCCI Inspection process and NCCI dispute resolution process works (Tr. Appeal Hr'g 212:20-23.)

She provided opinion on the impact that allowing classification code changes to be made retroactively would have upon the workers' compensation insurance market. (Tr. Appeal Hr'g 215-216.) In her opinion, allowing retroactive classification code changes would create uncertainty for insurers relative to the amount of money available to pay claims. (Tr. Appeal Hr'g 215-216.)

Ms. Longanacre testified that in performing inspections that NCCI reviews operational information to determine if class codes are correct. (Tr. Appeal Hr'g 243.) She clarified that this means that the inspector reviews the business' daily activities as well as the duties and types of work performed by its employees. (Tr. Appeal Hr'g 243.) She testified that although none of the information on the inspection and classification form is there without reason, that the information in the 2014 NCCI Report regarding whether CLM's operations had changed in the last four years was essentially meaningless because the information came from CLM. (Tr. Appeal Hr'g 233-236.) However, her testimony also indicated that inspectors speak with the employer's designated contact for the purpose of understanding the employer's business operations. (Tr. Appeal Hr'g 236:14-23, 237:1-9.) She offered her opinion on the content of the NCCI Inspection Report and also on the subject of whether there had been changes in CLM's operations during the period that AIM insured CLM. (Tr. Appeal Hr'g 233-236, 244-245, 247-250.) In her opinion, CLM's operations had changed during the time that it was insured by AIM. (Tr. Appeal Hr'g 244-245, 247-248.)

VII. ANALYSIS

The primary issue in this matter is whether AIM should have retroactively changed the classification codes used in the 2011/2012 and 2012/2013 policies to match the classification code changes made in the 2014 NCCI Report so as to use the 8832 code as the governing classification code. (See CLM Exhibits 9, 15, 16.)

CLM maintains that the information contained in the NCCI 2014 Report, that there had not been any change in CLM's business operations in the prior four years that would affect a basic classification code change, obligates AIM to use the 8832 classification code in the 2011/2012 and 2012/2013 policies because it establishes that CLM was misclassified in those policies. AIM takes the position that it was not and is not obligated by NCCI rules or New Hampshire law to revise the 2011/2012 or 2012/2013 policy to use the 8832 code as the governing classification code. Further, AIM contends that CLM was not misclassified in the 2011/2012 or the 2012/2013 policy. NCCI's positions in this matter similar to those held by AIM.

Classification code assignments under the NCCI Basic Manual are based upon the employer's business. (NCCI Ex. C, Rule 1-D) The NCCI Basic Manual explains this concept as follows: "It is the business that is classified, not the individual employments, occupations or operations within the business." (NCCI Ex. C, Rule 1-D.) "The purpose of the classification procedure is to assign the one basic classification that best describes the business of the employer within a state. (NCCI Ex. C, Rule 1-D.) Where "no basic classification clearly describes the business, the classification that most closely describes the business must be assigned." (NCCI Ex. C, Rule 1-D-2.) Under the NCCI classification system, "[c]lassifications are divided into two types – Basic Classifications and Standard Exception Classifications." (NCCI Ex. C, Rule 1-B.) "Basic Classifications describe the business of the employer." (NCCI Ex. C, Rule 1-B-1.) "Standard Exception Classifications describe occupations that are common to many businesses. These common occupations are not included in a basic classification unless specified in the classification wording." (NCCI Ex. C, Rule 1-B-2.) In instances where more than one classification is applicable and a basic classification is applicable, "[t]he Governing Classification at a specific job or location is the classification, other than a standard exception classification that produces the greatest amount of payroll." (NCCI Ex. C, Rule 1-B-5.)

The NCCI Basic Manual recognizes that classification codes may be changed or corrected. (NCCI Ex. C, Rule 1-F.) With respect to "changes in classification," the NCCI Basic Manual provides: "Changes in classification due to changes in an insured's operations will be applied as of the date the change in operations occurred." (NCCI Ex. C, Rule 1-F-1.) As for "corrections in classification" that result in a "decrease of premium" the NCCI Basic Manual provides: "Corrections in classifications that result in a *decrease* in premium, whether determined during the policy period or at audit, must be applied retroactively to the inception of the policy." (NCCI

Ex. C, Rule 1-F-2.) Increase in premium due to classification correction is governed by NCCI Basic Manual Rule 1-F-3. (NCCI Ex. C, Rule 1-F-3.)

With respect to the policies at issue in this matter, the 2011/2012 and the 2012/2013 policies, the 8864 code was used as the governing basic classification code. (CLM Exhibits 4, 6.) Code 8810, which is known as a “Standard Exception Classification” code and which is used for “Clerical Office Employees NOC” where those employees do not fall within a governing basic classification code, was also used in the 2011/2012 and 2012/2013 policies due to the use of the 8864 code in those policies. (NCCI Ex. C, Rule 1-B-2-a; CLM Ex. 9.)

The 2013/2014 workers’ compensation policy that was in effect at the time of the 2014 NCCI inspection also used the 8864 and 8810 classification codes. (CLM Ex. 9.) Following the issuance of the 2014 NCCI Report, the 8864 and 8810 classification codes were removed from the 2013/2014 policy and the 8832 code was used instead. (CLM Ex. 15.) The elimination of the use of the 8810 code was dictated by NCCI Basic Manual Rule 1-B-2. (CLM Ex. 9; NCCI Ex. C, Rule 1-B-2-a.) Mr. Landers testified that premium was returned to CLM as a result of the use of the 8832 code in the 2013/2014 policy because the amount of premium charged for the 8832 code was less than that charged for the 8864 code. (Tr. Appeal Hr’g 172.) The decrease in premium was applied to the inception of the 2013/2104 policy. (Tr. Appeal Hr’g 172; CLM Ex. 15.)

Given that the change to the 8832 code in the 2013/2014 policy resulted in a decrease in premium that was calculated back to the inception date of that policy, the Hearing Officer finds that the changes in classification code made to the 2013/2014 policy was due to a classification “correction” rather than a classification “change” within the plain meaning of NCCI Basic Manual Rule 1-F. (NCCI Ex. C, Rules 1-F-1 and 1-F-2.)

The next issue is whether AIM was obligated to revise classification codes used for the 2011/2012 and 2012/2013 policies given that the 2014 NCCI Report resulted in a “correction” of classification code. CLM argues that NCCI Basic Manual Rule 1-F obligated AIM to apply the 8832 code retroactively to the 2011/2012 and 2012/2013 policies. AIM and NCCI maintain that neither the NCCI Basic Manual nor the 2014 NCCI Report required AIM to take such action.

Even if, *arguendo*, AIM is correct that it ordinarily would not have been obligated by the NCCI Basic Manual or 2014 NCCI Report to have re-audited the 2011/2012 or 2012/2013 policy based upon the 2014 NCCI Report or NCCI rules, the fact of the matter is that AIM did re-audit the 2011/2012 and 2012/2013 policies. (Tr. Appeal Hr’g 41-45, 51-55, 177; CLM Exhibits 5, 7, 11, 12, 17, 18.) In addition, it is clear from the record that the re-audit of the 2011/2012 and 2012/2013 policies that AIM conducted after the issuance of the 2014 NCCI Report included review of CLM’s payroll which resulted in a finding that there was “sufficient payroll data” for AIM to make adjustments to the audits for the 2011/2012 and 2012/2013 policies. (CLM Ex. 12,

Email from J. MacDougall to R. Hajer, dated 12/15/15; CLM Ex. 11, Email from F. Cataldo to S. St. Pierre, dated 11/12/15; Tr. Appeal Hr'g 175-176, 182.) However, AIM made a management decision that it would not be "issuing adjustments" based upon the revised audits it had done for the 2011/2012 and 2012/2013 policies due to its belief that it had not been obligated in the first instance by NCCI, the 2014 NCCI Report, or NCCI rules to have revised those audits. (CLM Ex. 12, Email from J. MacDougall to R. Hajer, dated 12/15/15.)

Again, the fact that AIM made a management decision not to return premium based upon the revised audits does not alter that: (1) AIM re-audited the payroll for the 2011/2012 and 2012/2013 policies; or (2) AIM prepared revised audit reports for the 2011/2012 and 2012/2013 policies. (Tr. Appeal Hr'g 41-45, 51-55, 177; CLM Exhibits 5, 7, 11, 12, 17, 18.) Moreover, this is an instance where AIM communicated to the insured both that: (1) it had conducted the re-audits; and (2) that the re-audits in fact established that adjustments to premium were indicated. (CLM Exhibits 11, 12.) Thus, the evidence establishes that re-audits were done for the 2011/2012 and 2012/2013 policies and also that AIM opted not to honor those re-audits. AIM conveyed its decision not to honor the re-audits of the 2011/2012 and 2012/2013 policies to CLM through its communication with CLM and through its refusal to refund premium to CLM. (CLM Ex. 12, Email from J. MacDougall to R. Hajer, dated 12/15/15; Tr. Appeal Hr'g 176, 182.) The fact that AIM refused to honor the audits does not mean that NCCI Rules supported its decision.

In fact, NCCI Basic Manual Rule 1-F-2 ("Rule 1-F-2") does not support CLM's action of refusing to honor the re-audits its auditor conducted of the 2011/2012 or 2012/2013 policies. Rule 1-F-2 was triggered by through AIM's actions of the re-audit of those policies. (NCCI Ex. C.) Thus, even if, *arguendo*, AIM would not normally have been required pursuant to NCCI Basic Manual rules or NCCI inspection reports to have retroactively applied the 8832 classification code to the 2011/2012 policy or the 2012/2013 policy, it became obligated to do so by the plain wording of Rule 1-F-2 when it re-audited those policies and the re-audits indicated that using the 8832 code would result in a decrease in premium. (CLM Ex. 12, Email from J. MacDougall to R. Hajer, dated 12/15/15; Tr. Appeal Hr'g 175-176, 182.)

The NCCI Basic Manual Rule 1-F-2 ("Rule 1-F-2") provides unambiguously on this point as follows: "Corrections in classifications that result in a *decrease* in premium, whether determined during the policy period or **at audit** must be applied retroactively to the inception of the policy." (NCCI Ex. C, emphasis added.) Further, NCCI Basic Manual Rule 1-F-2 unambiguously contemplates that corrections in classification code that result in a decrease in premium might be made when the policy is no longer in effect, namely, at the time of "audit". (NCCI Ex. C.) In short, pursuant to Rule 1-F-2, where, as here, an audit reveals that corrections in classification will result in a decrease in premium, the insurer must apply the correction to the

inception of the policy that is the subject of the audit. (NCCI Ex. C.) Notably, Rule 1-F-2 does not require that audit report to have been issued in order for it to apply. (NCCI Ex. C.) Rather, by its plain and ordinary language, Rule 1-F-2 is triggered simply by an audit that indicates a correction in classification code will result in a decrease in premium. (NCCI Ex. C.)

The Hearing Officer notes that although Mr. Landers testified at the appeal hearing that AIM could not have retroactively changed the classification codes in the 2011/2012 or 2012/2013 policy without NCCI's authorization, neither AIM nor NCCI presented any NCCI rule or other written authority that supports that assertion See generally Appeal Record.

In summary, based upon the evidence of AIM's re-audit of the payroll and preparation of revised audit reports for the 2011/2012 and 2012/2013 policies, the Hearing Officer concludes that CLM has met its burden of proving by a preponderance of the evidence that NCCI Basic Manual Rule 1-F-2 obligated AIM to correct the classification codes used in the 2011/2012 and 2012/2013 policies retroactively to the inception dates of those policies to use the 8832 classification code instead of the 8864 code. This result is required by the plain meaning of NCCI Basic Manual Rule 1-F-2 because those corrections in classification, namely the deletion of the 8864 and 8810 classification codes and replacement of them with the 8832 classification code, would result in a decrease in premium due to the 8832 code being a lower rated code than the 8864 code. (Tr. Appeal Hr'g 160-161, 163, 172; CLM Ex. 15.)

New Hampshire insurance statute RSA 412:35, I, supports and requires this result. See RSA 412:35, I. Under RSA 412:35, I, all workers' compensation policies issued in New Hampshire must be issued on an "auditable basis." See RSA 412:35, I. Relatedly, RSA 412:35, I, requires that the final premium charged for workers' compensation policies issued in New Hampshire be "based upon actual exposure existing during the term of the policy coverage." RSA 412:35, I. The requirement in RSA 412:35, I, that the final premium charged by the insurer be based upon the "actual exposure" that existed during the policy period necessarily requires that the final premium charged be based upon the use of the correct classification codes. Furthermore, while RSA 412:35, III, sets forth the technical process for an audit, nothing in RSA 412:35 prohibits the revision of an audit. See RSA 412:35. In fact, such a prohibition would be contrary to the mandate imposed upon New Hampshire workers' compensation insurers by RSA 412:35, I, to bill the final premium for workers' compensation policies based upon the "actual exposure existing during the term of the policy coverage." RSA 412:35, I.

In this instance, the 2014 NCCI Report indicates that there had not been "a change in business operations in the last four years that would affect a basic classification change." (CLM Ex. 9.) In addition, Mr. Bergeron testified that CLM had not had any change in business operations pertinent to the 8832 versus the 8864 code issue the entire time that it was insured by AIM. (Tr. Appeal Hr'g 32:17-20, 35:1-7, 88-92, 98-100.) This evidence establishes that: (1)

CLM was misclassified in the 2011/2012 and 2012/2013 policies; and (2) the 8832 classification code should have been used in the 2011/2012 and 2012/2013 policies as the governing classification code instead of the 8864 code. The evidence also establishes that the final premium AIM charged CLM for the 2011/2012 and 2012/2013 policies was not based upon the “actual exposure existing during the term of the policy coverage” as required by RSA 412:35, I, because AIM did not use the correct classification codes in that determination.

At the appeal hearing, Ms. Longanacre testified that the information contained in the 2014 NCCI Report that there had not been any change in CLM’s business operations in the previous four years that would affect a basic classification change was basically meaningless because CLM supplied that information. (Tr. Appeal Hr’g 233-236, 248-250.) Ms. Longanacre’s testimony on this issue is not persuasive because there is nothing in the 2014 NCCI Report itself that shows or explains the source of that information in the report. (CLM Ex. 9.) However, even if the information about whether there had been any change in CLM’s business operations in the prior four years that would have affected a basic classification change in the 2014 NCCI Report originated from CLM, that factor is not decisive. It is evident from the 2014 NCCI Report that much of the information contained in that report originated from CLM. (CLM Ex. 9.) Ms. Longanacre also testified at the appeal hearing that there had been a change CLM’s business operations. (Tr. Appeal Hr’g 244-245, 247-248.) Ms. Loganacre’s testimony on that issue is also not persuasive because her testimony did not establish CLM’s principal business type or operations—mental health counseling—had changed. Rather, the change went to the use of a classification code that is not at issue in this appeal – the 8842 group home code. (Tr. Appeal Hr’g 247-248.) Further, none of the other evidence presented establishes that CLM’s business type or operations had changed. See generally Appeal Record.

The Hearing Officer also does not find testimony of AIM’s witness Deborah Stone or NCCI’s witness Maureen Longanacre that a ruling in this matter in CLM’s favor would be disruptive to the workers’ compensation market to be persuasive. (Tr. Appeal Hr’g 196-199, 215-216.) Ms. Stone’s and Ms. Longanacre’s testimony on this issue might have been persuasive if workers’ compensation insurance policies in New Hampshire were not mandated by law to be issued on an auditable basis or if this proposed order and decision was not limited to the unique facts and circumstances of this matter. However, this proposed decision and order is limited to the particular facts and circumstances of this matter which are established by the evidence admitted in *this* appeal. In addition, the scope of review of policies through the NCCI process is limited in terms of time by the NCCI Basic Manual as was explained in the Order I issued on this date on AIM’s Motion to Dismiss. (Order on AIM’s MTD, dated 7/11/18.) For the forgoing reasons, the Hearing Officer finds the concerns Ms. Stone and Ms. Longanacre raised regarding the alleged potential negative impact a ruling in CLM’s favor in this matter would have upon the broader workers’ compensation market to be unfounded.

Finally, the Hearing Officer does not find the arguments or evidence that AIM and NCCI offered on the matters regarding CLM's intentions or motives have any bearing on the issues at the center of this appeal. AIM and NCCI argued that CLM made essentially a "tactical decision" not to pursue the 8832 code earlier than it did and/or that CLM sat on its rights relative to the 8832 code versus 8864 code issue. I do not find any merit to these arguments or accord any weight to evidence AIM or NCCI presented in support of these arguments because these arguments are irrelevant to the underlying premise of the NCCI classification code system, *i.e.*, that a business be properly classified so that it can be properly rated. (See generally NCCI Ex. C, NCCI Basic Manual Rule 1.)

In conclusion, CLM has met its burden of persuasion by proving by a preponderance of the evidence that AIM did re-audit the 2011/2012 and 2012/2013 policies using the lower rated 8832 classification code and therefore that AIM was and is obligated by Basic Manual Rule 1-F-2 to apply that classification code to the inception each of those policies. Further, even if AIM had not prepared the revised audits for the 2011/2012 or the 2012/2013 policies and those revised audit reports are not taken into consideration, RSA 412:35, I, required AIM to charge premium for the 2011/2012 and 2012/2013 policies based upon the use of 8832 code instead of the 8864 code because the evidence at the hearing established that 8832 classification code was the correct classification code for those policy years.

VIII. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLM, AIM, and NCCI have each submitted Proposed Findings of Fact and Conclusions of Law. To the extent that such proposed findings of fact and rulings/conclusions of law are consistent and addressed by this Proposed Decision and Order and/or by the Order on AIM's Motion to Dismiss dated July 11, 2018, they are granted. All other of the parties' proposed findings of fact and rulings/conclusions of law are denied.

IX. CONCLUSION

Based upon the evidence presented at the appeal hearing, I find that CLM has met its burden of proving by a preponderance of the evidence that AIM is obligated by NCCI Basic Manual Rule 1-F-2 to apply the 8832 classification code retroactively to the inception of the 2011/2012 and 2012/2013 policies and that it (CLM) was previously misclassified by and through the use of the 8864 code in those policies. This ruling is also supported by RSA 412:35, I, which requires the final premium an insurer charges an insured for a workers' compensation policy issued in New Hampshire to be based upon the "actual exposure" that existed "during the term of the policy coverage." RSA 412:35, I.

For the foregoing reasons, I recommend that AIM be ordered to retroactively apply the 8832 classification code to the 2011/2012 and 2012/2013 policies as the governing

classification code in accordance with Basic Manual Rule 1-F-2 and make all other necessary related adjustments that the Basic Manual requires for those two policies relative to making that classification code correction.

Date: 7/11/18


Emily Doherty, Hearing Officer