



**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 ON MOTION FOR RECONSIDERATION

Before the Department is a Motion for Reconsideration (Motion) filed by Colonial Green Products Distributors, LLC (Colonial) in response to the Department's October 15, 2021 Order (Order). The Order answered eight (8) questions Colonial presented to the Department for Declaratory Ruling in a petition (Petition), pursuant to Ins 209.¹ As set forth below, Colonial's Motion for Reconsideration is *denied*.

I. Regulatory Background

At the outset, the Department's regulatory oversight of insurance matters is set forth within federal and state law. See New Hampshire-Vermont Health Serv. v. Whaland, 119 N.H. 886, 891 (1979) (The purpose of the federal McCarran-Ferguson Act was to give states broad powers in the regulation of insurance

¹ Colonial's petition included two questions Colonial had previously presented to the Cheshire Superior Court (Court) in a Declaratory Judgment Action; the Court ruled on June 15, 2021 that it would hold the court proceedings in abeyance pending the Department's administrative review of Colonial's questions. See Department's October 15, 2021 Order; Cheshire Superior Court Order, June 15, 2021 (Docket # 213-2019-CV-00277).

contracts). The Department is a state regulatory agency with regulatory authority as set forth under Title XXXVII of New Hampshire statutes. See RSA 400-A:1; RSA 400-A:3. This regulatory authority includes oversight of licensed workers' compensation insurers, such as Cincinnati Insurance Company (Cincinnati) and Travelers Property Casualty Company of America (Travelers), as well as authorized advisory organizations, such as the National Council on Compensation Insurance, Inc. (NCCI).² The Department is a member of the National Association of Insurance Commissioners (NAIC) with states across the nation: (1) to promote a solvent and competitive market within the insurance industry and (2) to provide adequate protections for consumers consistent with state and federal insurance laws. See, e.g., [New Hampshire Insurance Department - About Us \(nh.gov\)](#); [New Hampshire Insurance Department - Links \(nh.gov\)](#).

As explained in the Department's Order with regard to the regulation of workers' compensation insurance contracts, the Legislature outlines the Department's regulatory oversight of its licensees' activities, including Department approval of workers' compensation rate calculations prior to use in the market; how these policies are audited to ensure that premiums are based on actual exposure during a policy term; and the process by which an insured may seek pertinent information relating to workers' compensation rate information when there is a rate dispute. See RSA 412:28; RSA 412:23; RSA 412:35; RSA 412:27.³

² Cincinnati, Travelers, and NCCI are engaged in the current dispute with Colonial about workers' compensation rate calculations and/or the accessibility of rate information.

³ **RSA 412:28: Filing and Approval of Rates and Rating Plans**

I. Every insurer, that insures employers against liability for compensation under the workers' compensation law, RSA 281-A, shall file with the insurance commissioner individually or in collaboration with others, in such form as the commissioner may prescribe 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; provided, that none of the above shall

II. Legal Analysis of Colonial's Motion

A. Colonial's position that the Department should issue Declaratory Rulings that would bypass the Department's administrative process for workers' compensation audits and rate disputes is inconsistent with New Hampshire law

Throughout Colonial's lengthy Motion and Petition, Colonial repeatedly invites the Department to ignore the administrative laws and procedures set forth by the Legislature relating to (1) workers' compensation rate approvals, which

take effect until the commissioner shall have approved the same as adequate, not excessive, and not unfairly discriminatory.

II. An insurer shall file its rates by filing a multiplier, and, if applicable, other modifications to the prospective loss costs and rating plan filed by the National Council on Compensation Insurance or other authorized advisory organization on behalf of the insurer as permitted by RSA 412:23.

III. At the same time as a filing made pursuant to paragraphs I and II, every insurer shall file, or incorporate by reference any material that has been filed with and approved by the commissioner, all supplementary statistical and supporting information to be used as justification for this filing. . .

RSA 412:23: Advisory Organizations; Permitted Activity

An advisory organization in addition to other activities not prohibited, is authorized, on behalf of its members and subscribers, to:

I. Develop statistical plans including territorial and class definitions.

II. Collect statistical data from members, subscribers or any other source.

III. Prepare, file and distribute prospective loss costs which may include provisions for special assessments.

IV. Prepare, file and distribute factors, calculations or formulas pertaining to classification, territory, increased limits and other variables.

V. Prepare, file and distribute manuals of rating rules, rating schedules and other supplementary rating information that do not include final rates, expense provisions, profit provisions or minimum premiums.

VI. Distribute information that is required or directed to be filed with the commissioner. . .

RSA 412:35: Auditable Basis Policies

I. All workers' compensation policies issued in this state shall be issued on an auditable basis. A final premium shall be charged based upon actual exposure existing during the term of the policy coverage.

II. Audits shall be conducted by either physical inspection of an insured's records and operations, or by telephone or mail request by the insurer to the insured.

III. Audits shall be completed promptly, no more than 120 days after the expiration or cancellation of the policy, provided that there is no bona fide dispute. Any insurer that violates the provisions of this paragraph shall be subject to the penalty provisions of RSA 412:40. . .

RSA 412:27: Information to be Furnished Insureds; Hearings and 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.

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.

includes approval of NCCI's rating manuals and rules (Manuals); (2) the audit process pertaining to workers' compensation policies that ensures that final premiums charged are based on actual exposure during a policy term; (3) the process in which insureds may obtain pertinent information relating to their rate, including relevant portions of the Manuals; and (4) the dispute resolution process between employers and insurers involving the New Hampshire Workers Compensation Appeals Board (Board), which is outlined in the Manuals approved by the Department. See RSA 412:28; RSA 412:23; RSA 412:35; RSA 412:27. In doing so, Colonial asserts constitutional arguments as grounds for replacing the current regulatory framework set forth under New Hampshire law.

Based on its Motion and Petition, rather than questioning the applicability of one particular rule or statute in a declaratory ruling proceeding, Colonial is essentially asking the Department to reject the entire statutory and regulatory framework established for workers' compensation rates and audit procedures. This request is well beyond the scope of Ins 209.⁴

Moreover, as explained in the Order and above, the Department has broad regulatory authority over workers' compensation insurance contracts, just as other states do nationwide. As a licensed advisory organization, NCCI is significantly

⁴ **Ins 209.01** (Petitions)

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

(1) The exact ruling being requested, including any rule or statute implicated;
(2) The statutory and factual basis for the ruling, including any supporting affidavits or memoranda of law; and
(3) A statement as to how the language of the rule or statute applies to the circumstances of the petitioner's case.
(b) Any petition for declaratory ruling which does not contain the information required in (a) above shall be inadequate.

involved in the calculation of workers' compensation rates throughout the country with its involvement in 38 other states besides New Hampshire; this work includes 3.3 million policies covering at least \$26.4 billion in workers' compensation premiums. The regulatory laws and rules developed and proposed to legislatures pertaining to workers' compensation contracts are often the result of collaboration between state insurance departments nationwide through the NAIC to address industry and consumer concerns. To that end, the New Hampshire Legislature has the final say as to how the Department regulates these contracts. Like other state courts, the New Hampshire Supreme Court has never declared that the current regulatory framework pertaining to workers' compensation policies, including the use of NCCI Manuals as part of that framework, is a substantial impairment of an insured's contract right or is otherwise constitutionally flawed. As such, the Department declines to make such a declaratory ruling.

B. The Department's Reply to Colonial's Supplemental Arguments

A common thread within most of Colonial's Motion pertains to why it thinks it should bypass administrative proceedings pertaining to the regulation of workers' compensation policies. Below, the Department responds to arguments the Department feels obligated to address to either correct the record or to clarify the law applicable to its administrative proceedings.

1. RSA 491:22-a

In its Motion Colonial asserts that RSA 491:22-a, a statute pertaining to superior court proceedings, applies to its request for declaratory rulings at the Department. That position is not supported by New Hampshire law. The

Department's proceedings and regulatory oversight are governed by the New Hampshire Insurance Code, Title XXXVII, Ins 200, and RSA 541-A.

2. NCCI Manuals

Colonial asserts that additional NCCI Manuals, in particular the NCCI Assigned Carrier Performance Standards Manual, (PS Manual), are not available to Colonial at the Department or elsewhere and these manuals are relevant to its disputes with Travelers and Cincinnati. Colonial's position is not supported by the regulatory framework and the Department's enforcement of those regulations. The Department approves three (3) manuals, referred herein as the Manuals, that are relevant to (1) workers' compensation rate filings; (2) rate classification parameters applied to employers; and (3) disputes between an insured and insurer about workers' compensation rates. There are three other manuals that NCCI publishes, including the PS Manual, that the Department views as akin to manuals of procedure for NCCI members. The Department does not approve those manuals and does not consider them when reviewing disputes between insureds and insurers during administrative proceedings at the Department.

Colonial also asserts that all NCCI Manuals must be disregarded because they are contract language that must be disclosed without charge to the insured. Colonial's position is not consistent with New Hampshire law. As the Order explained, the Department considers the Manuals when approving and/or reviewing workers' compensation rates. However, the Manuals would not be part of an insurance contract just like underwriting guidelines that apply to other insurance contracts to determine rates would not be part of an insurance contract.

In the alternative, Colonial asserts that the Manuals must be “pertinent information” and, if they are pertinent information, then they are not enforceable. This flies in the face of the regulatory scheme previously described. The Department considers the application of the Manuals to the circumstances of a rate dispute between an insured and insurer to determine if that application is consistent with RSA 412:35. The phrase “pertinent information” comes from RSA 412:27. RSA 412:27 is a discovery statute that permits insureds to access “pertinent information” as to workers’ compensation rates. The statute’s legislative grant of authority to insureds in order for them to obtain information regarding rate formation does not implicate any contract formation issues. Rather, the term “pertinent information” relates to information outside of the contract that is relevant to premium rate determination from a regulatory perspective which permits insureds access to information in regard to how the rate (contract price) was determined. See RSA 412:27. As here, the Manuals are “pertinent information” that would trigger the application of RSA 412:27 and any remedies stemming therefrom for an insured.

3. Colonial’s Position that the Department was Inaccessible for 15 months

Colonial asserts that it was not possible for a representative to come to the Department prior to mid May 2021 to review the Manuals because the Department was closed due to the Covid pandemic. That position is not accurate. First, Colonial knew by early December 2019 that the Manuals were available for review at the Department but it made no efforts to review these manuals until after the Department’s October 15, 2021 Order. In addition, in his emergency orders, the

Governor specifically exempted state agencies from any closures during the pandemic. As such, the Department has remained open to the public with staff present ever since the pandemic was declared in March 2020.

4. Colonial's Position that the Department did not answer Question 4 of Colonial's Petition

Colonial asserts that the Department did not answer its question as to whether the Manuals are administrative rules. As indicated in the Department's Order, they are not. See Order, Department's Response to Question 4.

5. Colonial's Unfair Insurance Trade Practice Arguments

Colonial asserts that the Department should rule that Travelers and other workers' compensation insurers have engaged in unfair insurance trade practices (UTP), pursuant to RSA 417:4 (XII) and (XIV). Colonial's invitation to the Department to make a declaratory ruling on its UTP allegations, outside a Department investigation, is inconsistent with New Hampshire law. Once an UTP complaint is filed, a Department investigation, pursuant to RSA 400-A:16, would proceed, during which the Department would request and obtain input from a licensee as to the complainant's allegations. See, e.g., RSA 400-A:15-e. If the Department had reason to believe, after an investigation, that a licensee had engaged in an UTP, a Department hearing would be scheduled to provide a licensee an opportunity to be heard on the matter. See RSA 417:12.

Here, over the past five years Colonial, through a representative, has submitted at least two (2) inquiries with the Department associated with its workers' compensation rate and audit disputes in this matter. At no time has the Department, through investigation, considered Colonial's allegations as

establishing a violation of the UTP law by any of its regulated entities. Rather, the Department has referred Colonial to engage in the regulatory dispute resolution process, which includes a hearing before the Board with appellate rights to the Department for a *denovo* review. Moreover, a declaratory ruling procedure, pursuant to Ins 209, is not the proper procedure to resolve such matters under New Hampshire law.⁵

6. Colonial's Additional Arguments

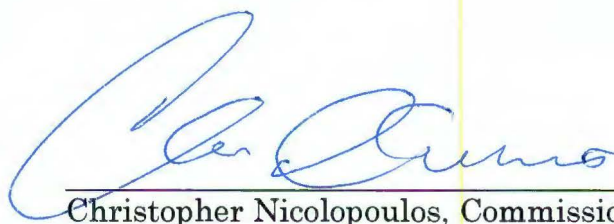
Upon review of Colonial's additional arguments, the Department concludes that these arguments, under the circumstances presented, have either already been addressed by the Department's Order or lack merit. As such, they do not warrant further discussion.

III. Conclusion

In sum, the Department does not find that its Order is unlawful, unjust, unreasonable, illegal, or an abuse of discretion. See Ins 207.06.⁶ As such, the Motion is denied.

SO ORDERED.

Date: 11-19-2021



Christopher Nicolopoulos, Commissioner

⁵ It is worth noting that much like RSA 358-A cases, only individual consumers, as defined in RSA 417:18, may bring an action in court against an insurer after the Department has found that an insurer has engaged in an UTP. See RSA 417:18; RSA 417:19.

⁶ **Ins 207.06(b)**: A motion for reconsideration shall: (1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered; (2) Describe how each error causes the final decision to be unlawful, unjust, unreasonable, or illegal in respect to jurisdiction, authority, or observance of the law, an abuse of discretion, or is arbitrary, unreasonable, or capricious. . .