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**Filing of the Workers' Compensation Rating and Inspection Bureau
for Revisions to the Massachusetts Workers' Compensation and Employers
Liability Insurance Manual to Establish an Audit Noncompliance Endorsement**

Docket No. R2018-01

Decision and Order

I. Introduction and Procedural History

On January 29, 2018, the Workers' Compensation Rating and Inspection Bureau of Massachusetts ("WCRIB") submitted a filing that proposes to revise the Massachusetts Workers' Compensation and Employers Liability Insurance Manual (the "Manual") to establish a rule, endorsement and statistical code that will enable an insurer writing workers' compensation insurance in Massachusetts to charge an audit noncompliance fee to employers who do not allow the insurer to audit their policy (the "Filing"). Although the Filing, in large measure, consists of documents relating to the adoption of audit noncompliance endorsements ("ANCES") in other states (Exhibit 1), it includes five exhibits specific to the WCRIB's proposal: Exhibit 2, Notice to Policyholder endorsement; Exhibit 3, Revisions to Manual Rule XV to add subsection B on the ANCE; Exhibit 4, changes to the Statistical Plan; Exhibit 5, the proposed endorsement; and Exhibit 6, instructions for voluntary market premium calculation. The proposed effective date for the revisions was January 1, 2018.¹

¹ The proposed effective date appears to be an artefact from prior WCRIB ANCE filings. It first proposed to apply an ANCE in the voluntary workers' compensation market on July 22, 2016; that filing, and a subsequent one, submitted on October 27, 2016 that proposed an ANCE and a Records Noncompliance Premium Surcharge Endorsement to apply, respectively, in the voluntary and residual markets, were withdrawn in 2017. The current filing memorandum largely duplicates the 2016 filing; both consist mainly

A hearing notice, issued on March 30, 2018, scheduled a public comment hearing for May 3, 2018; it was published in the Boston Globe on April 4, 2018. On April 13, 2018, the Office of the Attorney General filed a notice of appearance and, on April 17, 2018, the law firm Anderson Kreiger entered an appearance as counsel for the WCRIB.²

At the hearing, Thomas McCall, Esq., counsel for the State Rating Bureau ("SRB") and Mina S. Makarious, Esq. representing the WCRIB, made statements.³ Charlene Rideout, on behalf of the American Insurance Association, spoke in support of the WCRIB filing. Prior to the hearing, the Massachusetts Workers' Compensation Advisory Council also submitted written comment supporting the WCRIB.⁴ At the close of the public comment hearing, we held a conference with the parties to discuss scheduling. Counsel indicated that they hoped to resolve the matter, and requested a status conference. That conference, held on May 17, was the first of a series of conferences, at each of which the parties advised us that they were working on a stipulation.

A stipulation was filed on January 9, 2019 for our review. On February 13, 2019 we advised the parties that we had a number of concerns about it and would hold a status conference to discuss those concerns on March 6, 2019.⁵ Following the March 6 conference, the parties submitted revisions to the January 9 Stipulation that were responsive to our concerns. We summarize the revised stipulation below.

II. The Revised Stipulation

The stipulation establishes a pilot project that permits insurers to attach an ANCE to Massachusetts workers' compensation policies during a two year period beginning on May 1, 2019 and concluding on April 30, 2021, unless sooner terminated by the Commissioner. The endorsement itself, Exhibit I to the Revised Stipulation (Exhibit 5 to the Filing), is a form developed

of 152 pages of material from the National Council on Compensation Insurance relating to the adoption of ANCEs in other United States jurisdictions. Exhibits 2 through 5 to the 2016 filing parallel Exhibits 3 through 6 of the 2018 filing.

² On April 30, the Attorney General augmented her notice of appearance to add Diana Hooley, Esq. as counsel.

³ The Attorney General did not make a statement.

⁴ Following the hearing, an insurance producer and a business owner submitted statements expressing concerns about the actual audit process.

⁵ At the request of the parties, we also held a telephone conference on February 20 to provide more specific guidance about our questions.

by the National Council on Compensation Insurers ("NCCI") that, according to the Filing, has been approved in 34 NCCI jurisdictions and five independent rating bureaus in other jurisdictions. The parties confirmed that the ANCE will be attached only to policies written in the voluntary market, and will not be used in the residual market. During the pilot project, an insurer who issues an ANCE to an employer assigned to a particular workers' compensation classification must also issue one to any other employer it insures who is assigned to that classification. The parties clarified that insurers may attach an ANCE to other employers in a classification only upon inception of a policy or the renewal date, not during the term of an existing policy.

In response to queries about the interface between the endorsement and the statutory provisions for cancelling a workers' compensation policy, the parties agreed that an insurer may not initiate cancellation for failure to pay premium on the ground that the policyholder has not paid an ANCE charge. Changes to Manual Rule XV B. proposed in the Filing were revised to remove the reference to "Massachusetts state laws" relating to workers' compensation policy audits, thereby clarifying that the audit rules and regulations with which insurers must comply are those set out in the Manual.

Attached to the January 9 Stipulation were three exhibits, one prescribing an explanation of the audit noncompliance charge to be sent by insurers to policyholders who receive an ANCE, and two sequential notices that an insurer must send to a policyholder when it attempts to obtain compliance with a payroll audit. Those exhibits require insurers to maintain records that a policyholder submits in connection with an audit in accordance with the confidentiality and privacy requirements of the policy and "all applicable laws." They do not affect the procedures applicable to a policyholders' appeal under the Massachusetts Notice to Policyholder Endorsement (WC 20 03 03D).

The Revised Stipulation also establishes a series of reporting options or requirements that apply during the pilot project. As revised, a policyholder that is concerned about the use of the ANCE program may report those concerns to the SRB, rather than to the Commissioner. The revision thus carefully separates appeals to the Commissioner under the Massachusetts Notice to Policyholder Endorsement from inquiries to the SRB about the pilot project. The extent to which insurers elect to use the ANCE and the number of Massachusetts employers who will receive the endorsement is uncertain. The Revised Stipulation requires the WCRIB, during the policy period, to report information on each policy to which an ANCE has been attached, including attempts to

obtain compliance with the ANCE and the success of such attempts, to the AG and the SRB every six months.

We conclude that the pilot project created pursuant to the Revised Stipulation has the salutary goal of collecting data specific to Massachusetts on the use of an ANCE as a tool for effective calculation and collection of workers' compensation insurance premiums. The provisions extending an insurer's use of an ANCE to all employers in a particular business classification and the mandatory forms for explaining and attempting compliance with an audit should remove potential complaints of bias in the selection of ANCE recipients or in compliance proceedings. It was apparent, at the March 6 status conference, that the parties recognize that the Revised Stipulation will be in effect solely for a two year period, and that a new filing will be required in 2021.

We note that no questions have been raised about Exhibits 4 and 6 to the Filing relating to revision of the Statistical Plan and voluntary market premium calculations. Our concerns about Exhibits 2, 3 and 5 have been satisfactorily resolved in the Revised Stipulation. We therefore approve the January 29, 2018 Filing, as modified by the Revised Stipulation, and the Revised Stipulation and revised exhibits, to be effective for the period from May 1, 2019 through April 30, 2021.

ENTERED this 26th day of March 2019.

Kristina A. Gasson
Presiding Officer

Jean F. Farrington
Presiding Officer

AFFIRMED this 26th day of March 2019:

Gary D. Anderson
Commissioner of Insurance