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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Paul M. Burch, Circuit Court Judge

RECEIVED
MAR 3 10 2016
SC Court of Appeals

Appellate Case No. 2015-000806

Ard Trucking Company Respondent,

v.

Travelers Property Casualty Company
of America d/b/a The Travelers Indemnity
Company of Illinois, Appellant. Appellant.

MOTION TO SUPPLEMENT RECORD PURSUANT TO SCACR RULE 212

Barnwell Whaley Patterson & Helms, LLC
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Attorney for Appellant

Driggers & Moyd
Martin S. Driggers, Sr., Esquire
P.O. Box 1439
Hartsville, SC 29551
843-332-5151
Attorney for Respondent

Comes now the Appellant Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois (hereinafter "Travelers") and hereby files its Motion to Supplement the Record on Appeal Pursuant to SCACR Rule 212. Travelers seeks to supplement the Record with a WCIP Rule 4 "Miscellaneous Rules" section attached as Appellant Supplemental Record Numbers 004 – 009. Travelers seeks to supplement the record for the ease of reference and convenience of the Court.

In South Carolina, the Workers' Compensation Insurance Plan, including Rule 4 and its "Miscellaneous Rules" section, constitute the law. See Avant v. Willowglen Academy, 367 S.C. 315, S.E.2d 797 (S.C. 2006) affirming 356 S.C. 181, 588 S.E.2d 125 (Ct. App. 2003); See also Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85, 719 S.E.2d 695 (Ct. App. 2011). Because the WCIP Rule 4 and the "Miscellaneous Rules" section of that Rule are the law, the Court of Appeals is entitled to have a copy of the law without the Court of Appeals having to, on its own, contact the South Carolina Department of Insurance or the NCCI. Further, Travelers provided the trial court below with a copy of Rule 4 attached as Exhibit 18 in its Memorandum in Support of its Motion for Summary Judgment; however, Travelers did not attach a copy of the "Miscellaneous Rules" portion of that Rule. Nevertheless, Travelers specifically referenced Rule 4 in its Motion for Summary Judgment, Memorandum in Support of Summary Judgment, as well as its Motion for Reconsideration, and further requested the trial court to issue an order granting it summary judgment based upon such rule. Accordingly, based on Travelers' attachment of Rule 4 (without the Miscellaneous Rules) and its reference to Rule 4 in its filings with the Court, and for the convenience of the Court, Travelers seeks to supplement the Record on Appeal with the "Miscellaneous Rules" portion of Rule 4.

Travelers requested Ard to consent to the supplement the Record with the Miscellaneous

Rules pursuant to Rule 212; however, Ard has been unwilling to consent to the same. It is clear that Ard will take the position that the “Miscellaneous Rules” portion of Rule 4 was not submitted to the trial court below and therefore it is not appropriate to be included in the Record pursuant to 210(c). However, such section does not apply to the law. Specifically, Rule 210(c) does set forth that “the Record shall not, however, include matter which was not presented to the lower court.” However, pursuant to 210(h), Rule 210(c) applies to “any fact which does not appear in the Record on Appeal.” (Emphasis added). Here, Travelers asserts that the “Miscellaneous Rules” section of Rule 4 is the “law” in South Carolina and, as the law, the “Miscellaneous Rules” section of Rule 4 was appropriately before the trial court and is appropriately before the Court of Appeals, as a matter of law, despite the “Miscellaneous Rules” section of Rule 4 not being attached as an Exhibit to Travelers’ Memorandum.¹

Based on the above, for efficiency and ease of reference, the Court of Appeals is entitled to “the law” in this matter to be attached to the Supplemental Record so that the Court of Appeals is not required to obtain the “Miscellaneous Rules” portion of Rule 4 by itself. For these reasons, Travelers respectfully requests that this Honorable Court grant its Motion to Supplement the Record with the “Miscellaneous Rules” portion of Rule 4, which is the law applicable to this matter.

Respectfully submitted,

By: 

Phillip S. Ferderigos
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(843) 577-7700
Counsel for the Appellant

Dated: March 29, 2016

¹ In other words, neither party is required to attach statutes, cases or the law as exhibits in its Memorandum in order for the law to be properly before the Court. Such matters are properly before the Court as a matter of law.

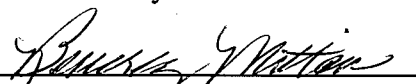
CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2016, I mailed a copy of the foregoing Motion to counsel of Record, with sufficient postage, properly addressed as follows:

Driggers & Moyd
Martin S. Driggers, Sr., Esquire
P.O. Box 1439
Hartsville, SC 29551
Attorney for Respondent

RECEIVED
MAR 31 2016
SC Court of Appeals

Barnwell Whaley Patterson & Helms, LLC

By: 
Beverly Mitton, Legal Assistant

Basic Manual—2001 Edition

Part One—Rules

Rule 4—Workers Compensation Insurance Plan Rules

Applicable To Assigned Risk Policies Only

Effective 01 Jan 2013 12:00:01

A. Workers Compensation Insurance Plan (WCIP)

10. Dispute Resolution Procedure

a. Procedure

The dispute resolution procedure can be categorized as either Assigned Risk Employer/Producer related disputes or WCIP related disputes.

b. Assigned Risk Employer/Producer Disputes

Any assigned risk policyholders and their producers affected by the actions of their assigned carrier or NCCI are provided with a process in which grievances can be reviewed, resolved, or heard by the mechanism that has been established and approved in the state for such grievances.

(1) Employer Disputes

The conditions outlined in Rule 4-A-2-g must be met in order for the employer to have a bona fide premium dispute. The Plan Administrator's intervention in disputes is generally limited to matters involving:

- Experience rating modification factors
- Application of rules contained in NCCI manuals
- Eligibility and assignment under the Workers Compensation Insurance Plan (WCIP)
- Classification assignment
- Assigned risk pricing programs

The Plan Administrator may intervene in disputes involving other matters arising under this Plan as determined by the Plan Administrator in its discretion.

The Plan Administrator (upon receipt of all necessary information regarding the dispute), will review the matter and provide a written response within thirty (30) days.

(a) Interstate Appeals

When an employer dispute concerns any of the above matters, (other than the application

of NCCI's **Experience Rating Plan Manual** rules), in more than one state, the Plan Administrator will determine the appropriate jurisdiction in which the dispute will be heard, based upon the following factors:

- Governing state (state generating the greatest payroll)
- The state covered by the assigned carrier with the greatest exposure
- The state where the operations are best represented

Interstate Employer-Related Dispute Jurisdiction Table

If . . .	Then . . .
As determined by the Plan Administrator, the governing state is an NCCI Plan administered state that best represents the operations of the business	The governing state's dispute resolution process will apply
The governing state is an NCCI Plan administered state, but the Plan Administrator determines that the governing state does not best represent the operations of the business	The Plan Administrator will review the dispute and determine the appropriate jurisdiction in which the dispute will be heard
The dispute involves NCCI Plan administered states and non-NCCI Plan administered states	The jurisdiction selected and resulting decision will apply only to the NCCI Plan administered states
The governing state is not an NCCI Plan administered state	The employer must follow the appropriate dispute resolution process for the governing state

When a dispute concerns the application of NCCI's **Experience Rating Plan Manual** rules for interstate rated risks, the Plan Administrator will determine the appropriate jurisdiction for the dispute to be heard.

Unless state-specific rules apply, the ruling of the state appeals mechanism (as determined by the Plan Administrator to have jurisdiction over the dispute) will apply to all assigned risk policies whether written by one or more assigned carriers.

For a general overview of the employer dispute resolution process, refer to NCCI's **Assigned Risk Supplement**.

(2) Producer Disputes

For disputes relating to the calculation and/or payment of producer fees and producer of record changes, the Plan Administrator (upon receipt of all necessary information regarding the dispute), will review the matter and provide a written decision within thirty (30) days.

c. WCIP Disputes

Any Plan participants (Association members and/or assigned carriers) who have a dispute with respect to any aspect of the Plan or Reinsurance Agreement(s) (including any dispute arising out of the Association Bylaws) must first seek a review of the matter under this section by providing the following to Plan Administrator:

- Written documentation detailing specific areas of the dispute
- Specific request for a review of all documentation
- Appropriate actions of areas to resolve the dispute

The Plan Administrator may request additional information, as it deems necessary to make a decision. All disputes submitted to the Plan Administrator will be governed as follows:

(1) Plan-Related Disputes

For disputes relating to the general operation of the Plan, including but not limited to, standards for assigned carrier performance, compensation and incentives and application assignment determination, the Plan Administrator (upon receipt of all necessary information regarding the dispute), will review the matter and provide a detailed written decision within thirty (30) days.

Any party affected by the decision of the Plan Administrator may seek binding arbitration for such purpose; or in the alternative, the party may seek a *de novo* review by the regulatory authority, by requesting such binding arbitration or *de novo* review in writing and at its own expense, within thirty (30) days after the date of such decision.

For disputes relating to the servicing carrier selection process, refer to the Bid Protest Procedures contained in the applicable Servicing Carrier Request for Proposal (RFP).

(2) Reinsurance Agreement-Related Disputes

If the dispute arises under the Association Bylaws or Reinsurance Agreement(s), the Administrator designated under the Association Bylaws will after receipt of all necessary information regarding the dispute, review the matter and provide a detailed written decision within thirty (30) days. Any party affected by the decision may seek a review by the Board of Directors established under the Association Bylaws by requesting such review, in writing, within thirty (30) days of the date of the decision by the Administrator under the Association Bylaws. The Board of Directors may (a) consider the matter and render its written decision pursuant to the procedures set forth in the Association Bylaws, or (b) waive its decision and offer the aggrieved party the option of appealing directly to the regulatory authority or submitting the dispute to arbitration in accordance with the terms and conditions established by the Board of Directors. Any party affected by a decision of the Board of Directors may seek a *de novo* review by an impartial arbitrator selected by mutual consent of the parties by requesting such a review, in writing, within thirty (30) days of the date of the Board of Directors' decision.

MISCELLANEOUS RULES

Effective 22 Sep 2009 12:00:01

DISPUTE RESOLUTION PROCESS

A. Summary of Dispute Resolution Process

The South Carolina Dispute Resolution Process (the Process) is hereby established to provide means by which South Carolina policyholders may obtain a review of the application of a National Council on Compensation Insurance, Inc. (NCCI) manual rule or rules to a workers compensation and employers liability insurance policy.

The Process has three steps:

1. A policyholder may obtain dispute resolution services only after the policyholder has made a reasonable attempt to first resolve the dispute directly with the insurance carrier.
2. If a policyholder cannot resolve the dispute directly with the carrier, then the policyholder may ask for NCCI's assistance with the dispute. Once NCCI has received a written request for dispute resolution services from the policyholder, NCCI will attempt to assist the policyholder and the carrier to reach an amicable resolution of the issues in dispute.
3. If a policyholder is unable to resolve the dispute to its satisfaction with NCCI's assistance, then the policyholder may ask NCCI to refer the dispute to the South Carolina Dispute Resolution Committee (the Committee) that is established by these rules.

The rules of the Process apply to disputes involving policies written in both the voluntary and residual markets. Additional rules found in NCCI's *Basic Manual for Workers Compensation and Employers Liability Insurance* Rule 4-A apply regarding the resolution of disputes involving policies written in the residual market. Policyholders must seek resolution of disputes regarding policies written in the residual market through NCCI's *Basic Manual* Rule 4-A before the rules of this Process apply.

B. Authority, Purpose, and Scope of the Process

The purpose of the Process is to review the application or interpretation of NCCI manual rules. The Committee does not have the authority to interpret, apply, or provide an opinion on state or federal laws, rules, or regulations; or decisions of courts or administrative proceedings; or to hear disputes brought by carriers.

1. It is not within the jurisdiction of either NCCI or the Committee to make exceptions to rules that are approved by the South Carolina Department of Insurance. The Committee will exercise its discretion to interpret and apply NCCI's manual rules to the facts of each dispute.
2. The Process as set forth in these rules must be exhausted before a dispute within the jurisdiction of the Committee may be appealed to the next level of review. The Committee will not hear disputes about any issue that is pending in another forum.
3. All issues in dispute arising from the same policy and policy period must be submitted for resolution under these rules at the same time.

4. This Process applies to any dispute arising out of a policy issued either before or after the effective date of these rules. Policyholders seeking dispute resolution under this process must request dispute resolution services from NCCI within three (3) years of the expiration date of the policy in question. Any extension of time to file a request for review after three (3) years of the policy expiration will be granted at the sole discretion of the Committee. An extension of time under this section will be granted only once.
5. Carriers are encouraged to consult with NCCI about any question regarding the application or interpretation of NCCI's rules. Should a carrier, after consultation with NCCI, want to formally dispute any action by NCCI regarding a policy written in the voluntary market, the carrier is directed to the appropriate regulatory authority (and not the Committee). Disputes by carriers about any aspect of the Plan or Pool are governed by the rules found in NCCI's *Basic Manual* Rule 4-A.

C. Operations of the Committee

1. Members of the Committee

- a. The Committee will consist of five (5) voting members, one (1) member from the staff of the South Carolina Department of Insurance and one (1) non-voting advisor from NCCI.
- b. The member from the staff of the South Carolina Department of Insurance will serve as the Chair of the Committee and will vote only for the purpose of breaking a tie vote.
- c. All voting members will be appointed by and serve at the pleasure of the Director of the Department of Insurance (Director) for an indefinite term.
- d. Vacancies on the Committee of voting members will be filled by the Director.
- e. The non-voting advisor from NCCI will be appointed by NCCI for an indefinite term.

2. Meetings of the Committee

- a. The Committee will meet at least once in the last quarter of each calendar year:
 - (1) To elect a Vice Chair for the following calendar year. The Vice Chair will assist the Chair in any duties and substitute for the Chair when the Chair cannot attend a meeting or has a conflict.
 - (2) If at the time of this meeting no disputes are pending before the Committee, the meeting may be held via telephone at the discretion of the Chair.
 - (3) Notice of any meeting will be posted on the Department's website.
- b. At the discretion of the Chair:
 - (i) Any meeting may be cancelled if the Committee has no business to discuss or there are no disputes pending before the Committee.
 - (ii) Additional meetings may be called.
- c. Once NCCI has received a request from the policyholder to refer a dispute for review by the Committee, NCCI will then, in writing, request the Committee will hear the dispute at its next scheduled meeting with an opening on the agenda, unless:
 - (1) A continuance is granted pursuant to these rules; or
 - (2) NCCI or the Committee determines that some action is required by NCCI, the policyholder or the carrier, in which case the matter will be heard at the next scheduled

meeting of the Committee with an opening on the agenda following the completion of the action requested.

- d. The official record of the proceedings will be the Decision Notice issued by the Committee following each meeting and any minutes of other Committee business recorded by the non-voting NCCI advisor to the Committee. Proceedings before the Committee are subject to the requirements of the South Carolina Freedom of Information Act, S.C. Code Ann. §34-4-90(c).

3. Duties of the Committee

a. It is the duty of every Committee member to:

- (1) Thoroughly review all Committee materials and agendas prior to each meeting of the Committee.
- (2) Determine as soon as possible if the member could reasonably be perceived to have a conflict of interest with any matter before the Committee. If so, that member will recuse himself or herself from participating in such Committee business.
- (3) Promptly notify the Chair if the member is unable to attend a Committee meeting or to otherwise participate in Committee business, and to secure an alternate who must be approved by the Chair to participate in the member's place prior to the Committee meeting in question. The Chair may appoint his or her own alternate if necessary to achieve a quorum.
- (4) Refrain from discussing any matter pending before the Committee with any other person who may have an interest in the outcome of a dispute pending before the Committee, except at a meeting of the Committee.
- (5) Fully participate in all disputes heard by the Committee and vote if authorized to vote in a given dispute.

b. It is the duty of the Chair of the Committee to:

- (1) Maintain order during all phases of the dispute resolution proceedings.
- (2) Promptly provide a written report to the Director of any chronic absence or inappropriate behavior by any Committee member.

c. It is the duty of the non-voting NCCI advisor to the Committee to:

- (i) Schedule each meeting of the Committee and send meeting notices to all Committee members and persons appearing before the Committee.
- (ii) Prepare and distribute agenda materials to the Committee prior to each Committee meeting.
- (iii) Prepare and distribute decisions of the Committee and minutes of other Committee business.
- (iv) Provide technical expertise to the Committee, either personally or through other employees of NCCI, on the application and interpretation of NCCI manual rules.

D. Appearances Before the Committee

1. Dispute resolution services under these rules are meant to be informal in nature. Formal administrative procedures or rules of South Carolina are not applicable to the Process.
2. Legal representation by either the policyholder or the carrier is not required. The policyholder or

the carrier may, at their own expense, be represented by legal counsel, or the policyholder may be represented by the policyholder's current agent of record.

3. Policyholders must choose to appear before the Committee in one of the following ways:

a. **In Writing:**

NCCI will notify the policyholder and the carrier in writing of the date and time of the Committee meeting at which the dispute will be heard. The Committee will only consider information received in writing by NCCI from the policyholder or the carrier prior to the date of the meeting by the Committee. Both the policyholder and the carrier may submit statements by others for the Committee's consideration. All statements made by the policyholder or carrier or any other person must be in writing and signed by the person making the statement. No personal appearance before the Committee by either the policyholder or the carrier or by any other person will be allowed, and no oral communications by any person will be considered by the Committee in making its decisions.

b. **By Telephone:**

NCCI will notify the policyholder and the carrier in writing of a date, time, and telephone number to be used to appear before the Committee. The Committee, in making its decisions, will consider information received by NCCI in writing prior to the date of the Committee meeting and any oral statements given by telephone at the time of the Committee meeting. Either the policyholder or the carrier may have witnesses present to give statements to the Committee by telephone.

c. **In Person:**

NCCI will notify the policyholder and the carrier in writing of a date, time, and place where parties and their witnesses are to appear before the Committee. The Committee, in making its decisions, will consider agenda materials prepared by NCCI prior to the date of the Committee meeting and any oral statements presented to the Committee at the time of the meeting. Either the policyholder or the carrier may have witnesses appear in person before the Committee.

4. The carrier will appear in the same manner chosen by the policyholder. Each party will be responsible for its own costs associated with participation in the Process. If the policyholder chooses to appear by telephone, NCCI will provide a toll free telephone number for use by the Committee, policyholder, carrier, and all witnesses.

E. Where to Send Documents

1. Initial requests by the policyholder for dispute resolution services must be sent to:

National Council on Compensation Insurance, Inc.
Regulatory Assurance Department—Dispute Resolution Services
901 Peninsula Corporate Circle
Boca Raton, FL 33487-1362
regulatoryassurance@ncci.com
Fax Number: 561-893-5043

2. Once NCCI receives a written request from a policyholder for dispute resolution services, NCCI

will assign a Regulatory Services Manager (RSM) to the dispute.

- a. NCCI will send a letter to the policyholder and the carrier advising the name and contact information of the RSM that has been assigned to the dispute.
- b. Any document submitted to NCCI under this Process must be submitted by the person or party making such a filing to the RSM using the contact information provided by NCCI.
- c. The filing party must also provide a copy simultaneously by US mail or facsimile transmission (fax) to all other parties to the dispute.

F. Disputes Involving Interstate Policies

When the resolution of the issue(s) in dispute affects the business operations of the policyholder in South Carolina and at least one other state, the Committee's decision will apply only to business operations located in South Carolina. The state of South Carolina has no jurisdiction to enforce any decision by the South Carolina Committee in another state.

G. Continuances

1. Except in an emergency, requests for continuances must be received by NCCI at least three (3) business days before the date the meeting is scheduled.
2. NCCI will grant a request timely submitted by either the policyholder or the carrier for a continuance of a meeting by the Committee, but in any case only one continuance per party will be allowed.

H. Decision of the Committee

1. A quorum consisting of a simple majority of Committee members eligible to vote must be present for each vote taken by the Committee.
2. The decision of the Committee will be by simple majority vote of those Committee members present at the Committee meeting. The votes of the individual Committee members will not be recorded or noted in the Committee's decision or otherwise disclosed in any manner to any person unless recording is requested in accordance with S.C. Code Ann. §38-4-90.
3. The Committee will issue its decision in writing within thirty (30) business days after the meeting, and will issue that decision to all parties to the dispute and the Director of the South Carolina Department of Insurance by US mail.
4. The Committee's decision will be a summary of the dispute resolution review proceedings including:
 - The issues in dispute
 - A statement of the applicable NCCI rules
 - A summary of the policyholder and carrier's positions on the issues in dispute
 - A brief discussion of the Committee's analysis
 - The Committee's decision
5. NCCI will distribute the Board's decision to all parties to the dispute and no one else unless required to do so by these rules, state law or regulatory agency.

I. Appeal of Committee Decisions

1. Either the policyholder or the insurer may appeal an NCCI denial of review or a decision of the Committee to the South Carolina Department of Insurance pursuant to S.C. Code Ann. §38-73-1080, 38-73-1270 and 38-73-495 by sending a written request for an appeal to:

South Carolina Department of Insurance
1201 Main Street, Suite 1000
Columbia, SC 29201

2. A request for an appeal under this section must be made by a party to the dispute within one year of policy expiration date or cancellation date, whichever comes first or in the case of decisions where a request for review with NCCI was filed more than one year after the expiration or cancellation date, but within three years of the expiration date of the policy as provided for under Section B-4 of this document then the request for an appeal must be made within thirty (30) business days after the date of the issuance of the Committee's decision letter or the decision of the Committee will become final.
3. An insurer or policyholder may appeal the final decision of the Department to the Administrative Law Court in accordance with S.C. Code Ann. §38-3-210.

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Box 10F2

Phillip S. Ferderigos, Partner
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March 29, 2016

RECEIVED

1-13

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Ard Trucking Company, Respondent
v.

Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois, Appellant
Appellate Court Case No. 2015-000806

Dear Ms. Kitchings:

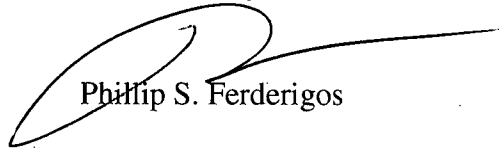
Please find enclosed the original and 16 copies of the Appellant's Record on Appeal and a Proof of Service. Please file the original and 15 copies and return one clocked copy to me in the envelope provided herein.

In addition, please find the original and one copy of Appellant's Motion to Supplement Record Pursuant to SCACR 212 along with our check for \$25. Please file the original and return the clocked copy in the envelope provided herein.

By copy of this letter and pursuant to the Certificates of Service, I am simultaneously serving counsel for the Respondent with copies of both documents.

Thank you for your assistance.

With kind regards,



Phillip S. Ferderigos

Enc.

Cc w/enc.: Martin S. Driggers, Sr., Esq.

PSF/bbm

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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE