

**IN THE COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA**

DCA Case No. 1D16-5416; Consolidated with 1D16-5408
LT Case No. 2016-002159-CA

THE FLORIDA OFFICE OF INSURANCE
REGULATION and DAVID ALTMAIER,
as Commissioner of the Florida Office of
Insurance Regulation,

Appellants,

v.

JAMES F. FEE, JR.,

Appellee.

**APPELLANTS OFFICE OF INSURANCE REGULATION AND
COMMISSIONER DAVID ALTMAIER'S INITIAL BRIEF**

*On Appeal from an Order on Non-Jury Trial and Final Judgement of the Circuit
Court of the Second Judicial Circuit, in and for Leon County, Florida*

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STATEMENT OF THE CASE

On August 10, 2016, James F. Fee, Jr. filed in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County a four-count Complaint against the Office and NCCI. R. 6-44. The Office is named only in Count II of the complaint. Id. at 24-27.

On Motion of the Office and subsequent Agreed Order submitted by the parties, this case was transferred to the Circuit Court of the Second Judicial Circuit, in and for Leon County. Id. at 117-122. An expedited bench trial was then scheduled for November 9, 2016. Id. at 191-193.

The Office and NCCI each filed a Motion to Dismiss. Id. at 123-135 & 194-258. By Order dated October 20, 2016, the Trial Court denied these Motions. Id. at 391-393 (“The complaint states a cause of action as to each of the four counts; the motions to dismiss are denied.”).

The trial was conducted as scheduled. On November 23, 2016, the Trial Court entered an Order on Non-Jury Trial, ruling in favor of Mr. Fee and against NCCI on all four counts of the Complaint and against the Office on Count II, the only claim alleged against it. Id. at 476-548.

The Office and NCCI timely and separately filed notices of appeal of the Order on Non-Jury Trial. Id. at 549-699. This Court *sua sponte* consolidated the two

appeals for appellate consideration, but directed that the parties independently brief the issues.

Pursuant to Order entered December 12, 2016, the Order on Non-Jury Trial has been stayed by this Court pending disposition of this expedited appeal.

STATEMENT OF THE FACTS

The Florida Office of Insurance Regulation is the agency responsible for the regulation of all activities in this State concerning insurers, including the review and approval or disapproval of filings for increases or decreases in insurance rates. § 20.121(3)(a)1., Fla. Stat; R. 453. The Office takes official actions on such rate filings through its agency head, the Director of the Office of Insurance Regulation, also known as the Commissioner of Insurance Regulation. § 20.121(3)(a)1. & (d), Fla. Stat. Mr. David Altmaier is currently the Commissioner of the Office. R. 453; Tr. 103. §

Workers' compensation insurers in Florida must file with the Office every rate and rating plan, and every modification thereto, and have those filings approved before using the requested rates. § 627.091(1), Fla. Stat. As an alternative to filing its own rates, an insurer may satisfy the statutory rate filing requirement by becoming a member of, or subscriber to, a licensed rating organization. § 627.091(4), Fla. Stat.; R. 453. A rating organization makes rate filings on behalf

of its subscribing insurers, who utilize that "overall statewide average level" and rates as their base for premiums once approved by the Office. Id.; Tr. 185.

The National Council on Compensation Insurance, Inc. is a licensed rating organization pursuant to section 627.221, et seq. and is authorized to make insurance rate filings in Florida on behalf of workers' compensation insurers. R. 453. All or nearly all workers' compensation insurers in Florida subscribe to NCCI, utilize the NCCI's services to make workers' compensation insurance rate filings on their behalf, and rely on the overall statewide average level and rates established in that filing. Id.; Tr. 102.

On April 28, 2016, the Supreme Court issued its decision in Castellanos v. Next Door Co., et al., 192 So. 3d 431 (Fla. 2016), which declared unconstitutional the statutory cap on a claimant's attorneys' fees in a workers' compensation case (set forth in section 440.34, Florida Statutes). R. 455. On this same day, NCCI issued a press release stating that it was analyzing the Court's decision and any rate increase that it may seek on behalf of its members as a result. Tr. 50. On May 27, 2016, NCCI on behalf of its subscribing insurers, submitted a rate filing to the Office proposing an increase of 17.1% in the overall statewide average rate to go into effect on August 1, 2016. This proposed rate level increase was crafted to address the anticipated increased financial exposure flowing from Castellanos, together with changes to the

Florida Workers Compensation Health Care Provider Reimbursement Manual. R. 454.

On June 9, 2016, the Florida Supreme Court entered its decision in Westphal v. City of St. Petersburg, 194 So. 3d 311 (Fla. 2016), which declared the 104-week statutory limitation on temporary total disability benefits set forth in section 440.15(2)(a), Florida Statutes, unconstitutional, and reinstated a 260-week limitation. In light of the Westphal decision, on June 30, 2016, NCCI amended its original rate filing to propose an additional rate increase of 2.2%, for a total proposed rate increase of 19.6% to become effective on October 1, 2016. Id.

James F. Fee, Jr., is a resident of Miami Shores, Florida. Tr. 48. Mr. Fee is the owner of and sole attorney in the law firm of Druckman & Fee, P.A., where he practices workers' compensation law. Id. at 49 & 73. Because of his professional involvement with workers' compensation insurance issues, Mr. Fee took an early and active interest in the rate filings by NCCI. Id. at 52-53.

On May 20, 2016, after reading the NCCI press release regarding Castellenos, Mr. Fee sent a letter to NCCI alleging that he was "aggrieved with the process of how their rating system was being applied" to his firm's insurance and requesting all records for NCCI workers' compensation rate filings from 2006 through 2016. Tr. 50; Fee Ex. 1. Mr. Fee sent several more letters over the next several months, some of which NCCI responded to through counsel, making further document

requests and expressing discontent with the records produced by NCCI. See Fee Exs. 2-5 & 7-9.

In a letter to NCCI dated July 12, 2016, Mr. Fee raised for the first time the issue that would ultimately be the sole legal basis of his Circuit Court Complaint as to the Office.¹ Fee Ex. 5. In this letter, Mr. Fee writes:

In addition to the above information, kindly provide me with documentation confirming that NCCI has complied with the public meeting notice requirement of Florida Statutes [section] 627.091(6) and the public meeting requirements of Florida Statutes [section] 286.011. Based upon my preliminary search of the Florida Administrative Register, I have not been able to locate any notices going back to the year 2006.

Id. at 1-2.

Section 627.091(6), Florida Statutes, cited by Mr. Fee as providing the applicable public notice requirement, provides in pertinent part as follows:

Whenever the committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance rates in this state meets to discuss the necessity for, or a request for, Florida rate increases or decreases, the determination of Florida rates, the rates to be requested, and any other matters pertaining specifically and directly to such Florida rates, such meetings shall be held in this state and shall be subject to s. 286.011. The committee of such a rating organization shall provide at least 3 weeks' prior notice of such meetings to the office and shall provide and least 14 days' prior notice of such meetings to the public by publication in the Florida Administrative Register.

¹ Mr. Fee has made no public records claims against the Office in this litigation.

As further clarified in later correspondence, Mr. Fee contends that NCCI has a committee subject to this statute that met to consider the subject rate filings without first giving the required public notice. See Fee Ex. 6. On this basis, Mr. Fee alleged that NCCI's filing should be deemed void and not considered by the Office.

NCCI's position is that the public notice requirement in section 627.091(6), Florida Statutes, does not apply because it does not have a committee that fits the description in the statute. Fee Ex. 16.

NCCI has three committees² established in its organizational documents: the Underwriting Committee, the Data Collection Procedures Committee, and the Actuarial Committee. Lovgren depo. at 61-62. As NCCI is a membership organization of insurance companies, each of these committees is made up entirely of representatives of those affiliated companies. Id. at 61. The activities of the Underwriting and Data Collection Procedures Committees do not relate at all to rates or rate filings. Id. at 63 & 68. The Actuarial Committee engages in research projects; there is no indication that these projects are specifically and directly related to Florida rate filings. Id. at 69.

² The NCCI board may have one or more committees or subcommittees, the names, functions, and relevance of which to this proceeding have not been established. Lovgren Depo. at 70.

For a period of time over twenty years ago, NCCI also had a "Classification and Rates Committee." Fee Ex. 16 at 4; Tr. 143. This Committee was comprised of representatives of NCCI member insurance companies. Tr. 143. Every NCCI draft rate, rule, and form filing had to be initially authorized for development and then formally approved by this Committee before being submitted to the insurance regulators. Id. at 144; Fee Ex. 16 at 6-7. This Committee squarely fits the description of "the committee" in section 627.091(6), Florida Statutes, and its meetings were subject to the Sunshine Law. Tr. 144; see Lovgren depo Ex. 2 (February 24, 1986, letter giving notice of meeting of Classification and Rates Committee).

The Classifications and Rates Committee was disbanded in 1991. Id.; Fee Ex. 16 at 5. Thereafter, NCCI "was very deliberate" in establishing and maintaining a structure and process that do not involve any committees in discussions of any matters pertaining specifically and directly to a Florida rate request.

Since the disbanding of the C & R Committees in 1991, there has not been a committee at NCCI that has been responsible for overseeing, reviewing or participating in NCCI's rate or loss cost filings. Those matters have been the exclusive province of NCCI's management and staff.

Fee. Ex. 16 at 5. NCCI's current process for rate filings involves staff preparation of the draft with no subsequent committee approval required before submission to regulators. Tr. 139, 144 & 147.

Consistent with this current practice, the subject rate filings and the ultimate 19.6% rate indication were prepared by an NCCI actuary, Mr. Jay Rosen. Tr. 147. None of these rate filings were discussed by an NCCI committee and, accordingly, there were no publicly noticed NCCI meetings regarding the filings.

Apparently unsatisfied with the position of NCCI on this issue, Fee wrote to Commissioner Altmaier on July 21, 2016. Fee Ex. 6. In this letter, Mr. Fee repeated his concern that NCCI had failed to comply with the Sunshine Law requirement found in section 627.091(6), Florida Statutes.

I see no plausible way for NCCI to deny that prior to the issuance of the above[-]referenced rate increase proposals, a committee of their organization met on one or more occasions to discuss the necessity for these specific rate increases. Any such meetings were to be held in Florida and subject to the provisions of 286.011. In addition, NCCI's committee was required to provide at least three weeks['] prior notice of such meetings to your office, and provide and least 14 days['] prior notice of such meanings [sic] to the public by publication in the Florida Administrative Register.

Fee Ex. 6 at 4. Fee continued that he found "no evidence that at any point relevant to this issue [] NCCI place[d] notice in the Florida Administrative Register" Id. at 4-5. On this basis, Fee requested that the public hearing scheduled for August 16, 2016, be postponed "until such time as NCCI has properly complied with their obligations under the statutory sections cited herein." Id. at 6.

Mr. Fee traveled to Tallahassee and met with Commissioner Altmaier in person on July 27, 2016, to voice his concerns. Tr. 64-65. Commissioner Altmaier

informed Mr. Fee that based on interviews with former and current NCCI employees, the Office had confirmed that NCCI currently has no committee as described in the statute and, therefore, the public notice requirements did not apply. Id. The Commissioner informed Mr. Fee that the Office was going to proceed with the public hearing on August 16th as noticed. Id. at 65.

Two weeks later, on August 10, 2016, Mr. Fee filed in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County a four-count Complaint against the Office and NCCI. R. 6 - 44. This Complaint sought declaratory and injunctive relief against both Defendants with respect to the rate filings. The Office is named only in Count II, which alleges violations of the public notice requirements in section 627.091(6), Florida Statutes, by NCCI based on its failure to give notice for one or more internal committee meetings regarding the subject rate filings. The relief sought against the Office is based on the theory that Office consideration or approval of the rate filings is tainted by NCCI's alleged Sunshine Law violation(s).

Mr. Fee did not seek preliminary injunctive relief pursuant to the Complaint. Accordingly, the Office continued its review of the rate filings and conducted a public hearing on August 16, 2016, in Tallahassee, Florida. R. 455. The purpose of this "fact-finding hearing" is "for NCCI to present its proposal and for affected stakeholders and other interested stakeholders to have – to weigh in with their thoughts and opinions." Jt Ex. 6 at 9 (Commissioner Altmaier's introductory

remarks at the hearing). This hearing was simulcast on The Florida Channel. Tr. 184. All materials that had been requested from and submitted by NCCI were available to the public on the Office's website two weeks prior to the hearing.³ Tr. 184. The public, including Mr. Fee, was given an opportunity to comment at the August 16, 2016, public hearing. R. 455; Tr. 182. Mr. Stephen Alexander, an actuary under contract with and being paid by Florida Workers' Advocates, provided testimony at the public hearing on behalf of Mr. Fee. R. 455.

The Office held open the time for submitting additional written public comments for one week after the hearing, and accepted comments until 5:00 p.m. August 23, 2016. Tr. 184. Pursuant to the same contractual arrangement referenced above, Mr. Alexander provided written comments to the Office on behalf of Mr. Fee on August 23, 2016. R. 455.

On September 27, 2016, the Office issued an Order on Rate Filing disapproving the amended rate filing. R. 455. While finding the requested 19.6% increase to not be justified, the Office wrote "[i]f the Filing were amended, an alternative rate increase of 14.5 percent is justified." Jt Ex. 8 at 6.

On October 4, 2016, NCCI submitted a revised rate filing to the Office proposing a 14.5% increase in the workers' compensation insurance rates. Jt Ex. 9.

³ All of NCCI's prior rate filings back to 2001 and videos of all public hearings on rate filings back to 2008 are also available on the Office's website. Id. at 182-83.

The revised rate filing was approved by the Commissioner and scheduled to go into effect on December 1, 2016. Id.; R. 455.

One month after entry of the Order approving the revised rate filing, the Trial Court conducted the evidentiary hearing in this case. The presentation of evidence focused on NCCI's preparation of the subject rate filing and whether there was a meeting of a committee during this process that should have been but was not noticed as required by section 627.091(6), Florida Statutes.

The internal NCCI rate filing process started with the Florida Supreme Court's decision in Castellenos when Chris Bailey, NCCI's state relations contact for Florida rates, "put in a request" with Jay Rosen, NCCI actuary for Florida rates, to analyze the case to determine whether he needed to file for a rate increase. Lovgren depo. at 75 & 77.⁴ From this point forward, the authority for the substance of the subject filings, including the proposed rate, resided solely in and was exercised solely by Mr. Rosen.

After Mr. Rosen had completed his analysis, he assembled a group of his staff for what is known at NCCI as "Technical Peer Review" meetings. Lovgren depo. at 36. With the exception to two NCCI regulatory employees (Ms. Lovgren and Mr.

⁴ This request gives rise to an "off-cycle, law-only filing," occasioned by a specific event, as contrasted with NCCI's usual "experience filing," submitted annually based on an analysis of an additional year of data. Lovgren depo. at 32-33.

Bailey), the attendees at this meeting were chosen by Mr. Rosen at his sole discretion and were all NCCI actuaries. Id.; Tr. 128-30. Mr. Rosen made his presentation to these other actuaries, who had the opportunity to question his findings as would occur in any typical “peer review.” Id.

There were also “Phase II” meetings with respect to both filings. These meetings typically involve a smaller group of actuaries (including Mr. Rosen) explaining the filings to regulatory services personnel with NCCI, who can ask questions to ensure they understand the filings and can explain them to others. Id. at 130; Lovgren depo. at 56.

Neither group is a standing committee: both were assembled on an ad hoc basis for these filings. There is also no indication that either group had been delegated any responsibility for rate filings by NCCI, had any other decision-making authority, or took any vote or other formal action to approve or disapprove Mr. Rosen’s presentation. The testimony of Ms. Lovgren, who attended Phase II and Technical Peer Review, was that those meetings were technical and informational in nature. Tr. 128-30 (Mr. Rosen explained “how he arrived at his number, what data he used, what methodologies he used” and “attendees had an opportunity to ask Mr. Rosen questions”). Mr. Rosen’s rate indication did not change as a result of those meetings. Lovgren depo. at 40.

In addition to its internal meetings, NCCI met with the Office several times during the Summer of 2016. Tr. 132. The first meeting was May 10th and involved a general discussion of Castellanos prior to a filing being submitted. Tr. 106. Messrs. Bailey and Rosen and Ms. Lovgren next travelled to Tallahassee and met with the Commissioner and Office staff on May 27, 2016, to personally present the original filing and give an overview of its contents. Lovgren depo. at 20. On July 13, 2016, there was a phone call between NCCI and Ms. Cooper, the Office's actuary, regarding clarification of some portion of the rate filing information. Id. at 58, 95-96. Meetings on June 22 and August 1 and a telephone call August 10, 2016, all concerned logistics for the August 16th public hearing, such as scheduling, the order of witnesses, and anticipated presentations. Id. at 28-29; Tr. 105-09. Finally, there was a brief phone call on September 20, 2016, to confirm that the information for the revised (14.5%) filing had been received. Tr. 109-110. None of these meetings or calls were publicly noticed.

Two weeks after the evidentiary hearing and one week before the scheduled effective date of the proposed rate, the Trial Court entered an Order on Non-Jury Trial and ruled in favor of Mr. Fee and against NCCI and the Office on all four counts of the Complaint. R. 476-548. With respect to Count II, the Trial Court found that the Technical Peer Review and Phase II meetings should have been publicly noticed. The Trial Court continued and broadly ruled that all meetings between

NCCI and Office staff should have noticed and open to the public. The Order on

Non-Jury Trial summarizes these rulings as follows:

The credible evidence shows NCCI clearly does use committees, with a series of meetings to finalize its rate filings. These committee meetings [Phase I, TPR and Phase II, and whatever else NCCI might call them in trying to avoid its public meeting responsibility[]] should have been properly noticed, and held in the Sunshine, with proper minutes. Separately, whether NCCI had a "committee" subject to section 627.091(6) is irrelevant to its obligation to conduct the decisional rate filing preparation meetings in public. As it happens, its process includes several groups of people who meet sequentially with its delegated actuary to make the decisions and prepare the filing, which means it is clearly within the statutory parameters of 627.091(6) requiring the meetings to comply with section 286.011. Its secret meetings with OIR also are violative of section 286.011, Florida Statutes. Even if NCCI's decisional process were actually limited to a single actuary, that decisional process is subject to the Government in the Sunshine public meeting requirement as mandated by law, despite NCCI's preference to exclude the public.

R. 539. The Trial Court granted injunctive and declaratory relief against the Office and NCCI, writing as follows:

Because the multiple non-public, secret meetings held by NCCI internally and with the OIR before the August 16, 2016 public hearing and NCCI's further violation of the Sunshine Law after the August 16, 2016 public hearing violate Florida's Sunshine Law, the 14.5% rate increase order and the underlying amended rate filing are void ab initio; the increase shall not take effect December 1, 2016. Similarly, the original Castellano rate filing and the post-Westphal amended rate filing are null and void, ab initio.

R. 547. This appeal followed.

SUMMARY OF THE ARGUMENT

Section 627.091(6), Florida Statutes, applies the Sunshine Law only to meetings of the committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance. NCCI has three committees. None of them have any responsibility for workers' compensation insurance rate filings. The Office investigated this very matter in 2014 and again in July 2016 as a result of Mr. Fee's inquiry and confirmed this conclusion both times. It is borne out in the record of this case, which demonstrates that decision-making for the subject rate filing was vested in one person, Mr. Rosen.

The meetings involving staff who discussed the rate with Mr. Rosen did not involve a committee and are not public meetings subject to the Sunshine Law. Single individuals vested with executive decision-making authority can meet with staff for fact-finding and technical assistance in the normal course of business without first having to provide public notice and comply with the other requirements. Only when public duties are delegated and a portion of the decision-making process given to a collegial body does the Sunshine Law attach.

In only limited circumstances may the Sunshine Law violations of an entity separate from a government agency be attributed to that agency and used as a basis to void government action. None of those circumstances, all of which focus on the relationship between the agency and the non-public entity and any public functions

performed by the latter, are present here. NCCI exists and functions independently of the Office and has not been delegated a public purpose or role in the Office's decision-making process. The actions or inactions of NCCI with respect to making workers' compensation rate filings are those of a private entity acting without direction from or oversight of the Office.

The unique statutory requirement that meetings of an NCCI committee be conducted in accordance with section 286.011, Florida Statutes, is procedural only. It is not substantive and does not delegate the performance of a public purpose to a private entity. This purely procedural requirement does not transform actions of an NCCI committee to public actions attributable to the Office.

If NCCI is found to have committed any Sunshine Law violations, they were cured by the Office's August 16, 2016, public hearing. This hearing was noticed and open to the public, who were allowed the opportunity to provide comments, and was also streamed live on the internet. All information that had been submitted to the Office by NCCI was available to the public two weeks prior to the hearing. The Office's public hearing could hardly have shined more Sunshine on the rate filing.

For all of these reasons, the Order on Non-Jury Trial should be reversed with directions that judgment be entered for the Office.

ARGUMENT

Standard of Review

The keystone of the Office's argument is the proper interpretation of section 627.091(6), Florida Statutes, and determination of the extent to which it extends Florida's Government in the Sunshine Law to activities of private rating organizations. Statutory interpretation is a question of law subject to de novo review. GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007); Kuria v. BMLRW, LLLP, 101 So. 3d 425, 426 (Fla. 1st DCA 2012).

This argument next involves the application of the facts found by the Trial Court to this law to determine whether internal meetings of NCCI actuaries and management regarding workers' compensation insurance rate filings are subject to the Sunshine Law by operation of section 627.091(6), Florida Statutes. The application of the law by the trial court to the facts found by it presents an issue of law, also subject to de novo review. Connor v. State, 803 So. 2d 598, 608 (Fla. 2001).

As to facts the Office disputes, such findings must be rejected if not supported by competent, substantial evidence. State v. Wilford, 720 So. 2d 617, 618 (Fla. 1st DCA 1998).

I. SECTION 627.091(6), FLORIDA STATUTES, APPLIES THE SUNSHINE LAW ONLY TO MEETINGS OF A COMMITTEE OF A RATING ORGANIZATION WITH RESPONSIBILITY FOR RATE FILINGS

Florida's Government in the Sunshine Law, found in section 286.011, Florida Statutes, imposes certain requirements on "meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." § 286.011(1), Fla. Stat. By these plain terms, only governmental entities in Florida are subject to the requirements of the Sunshine Law. Private entities are generally not subject to the Sunshine Law. See Sarasota Citizens for Responsible Gov't v. City of Sarasota, 48 So. 3d 755, 762-63 (Fla. 2010).

NCCI is a private corporation registered to do business in the State of Florida. R. 453. NCCI is not a governmental entity. NCCI is not a board or commission of any governmental entity. No NCCI employees are selected, hired, compensated, or supervised by the Office. No NCCI committees have been established by or at the direction of the Office. No members of NCCI committees are appointed by the Office. NCCI is a private company and, as such, not generally subject to the Sunshine Law.

NCCI's principal business is as a rating organization and, in that capacity, it holds a license from the Office issued pursuant to section 627.221, Florida Statutes, to make rate filings on behalf of workers' compensation insurers. Id. Like other non-

governmental entities, licensed rating organizations are not generally subject to the Sunshine Law. The Legislature has, however, created one limited extension of the Sunshine Law that applies to a specific type of meeting of a committee of a rating organization:

Whenever the committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance rates in this state meets to discuss the necessity for, or a request for, Florida rate increases or decreases, the determination of Florida rates, the rates to be requested, and any such other matters pertaining specifically and directly to such Florida rates, such meetings shall be held in this state and shall be subject to s. 286.011.

§ 627.091(6), Fla. Stat. NCCI is a rating organization and is subject to the Sunshine Law requirements imposed but this statute for meetings of "the committee" that discuss matters pertaining specifically and directly to Florida Rates.

A. None of NCCI's Established Committees Have Responsibility for Rate Filings.

NCCI has three committees; Data Collection Procedures, Actuarial, and Underwriting. None of these Committees have responsibility for or meet to discuss matters pertaining specifically and directly to Florida rates. None of these Committees met to discuss the subject rate filings.

NCCI previously had a "Classification and Rates Committee" that did have responsibility for and did meet to discuss Florida rates. This responsibility was quite broad: no rate filing could be prepared or submitted to the regulators without its

authorization. Fee Ex. 16 at 4. NCCI readily admits, and the Office concurs, that this Committee was subject to the Sunshine Law for meetings that fell within the scope of section 627.091(6), Florida Statutes. Tr. 144. This Committee was disbanded in 1991. NCCI did not re-delegate responsibility for rate filings to another committee. Rather, NCCI delegates this authority to management and staff. Fee Ex. 16 at 5.

In 2014, the Office questioned NCCI regarding whether the Underwriting Committee had assumed duties similar to those of the former Classification and Rates Committee and was therefore subject to the requirements of section 627.091(6), Florida Statutes. Fee Ex. 13. NCCI confirmed its post-1991 structure remained the same with no rate filing responsibility delegated to committees. Fee Ex. 16. The Office took no further action.

In this case, full responsibility for the filings was exercised by NCCI actuary Mr. Rosen. There is nothing in the record to support a conclusion that any other person or group of persons at NCCI had any approval or veto authority over the substance of this filing. See Tr. 136 (“These are potentially staff members that would have assisted him, but ultimately it was Jay Rosen’s decision on the rate filing.”).

There is no requirement in section 627.091(6), Florida Statutes, that NCCI publicly notice a meeting pursuant to the Sunshine Law in the absence of a

committee. Perhaps more importantly, there is no requirement in section 627.091(6), Florida Statutes, that NCCI have a committee with responsibility for rate filings.⁵

The Trial Court in its Order wrote that NCCI's delegation of rate filing authority to an actuary upon disbanding the Classification and Rates Committee was an attempt "to delegate its way out of the Sunshine" and "to use semantics" to avoid the Sunshine Law. R. 531 & 534 (Order at 56 & 59). The Order has numerous other inferences as to NCCI's motives. See id. at 535 (Order at 60) (NCCI's redelegation an attempt "excuse its obligation to conduct these meetings in the public eye"); id. at 537 (Order at 62) (referring to internal meetings as "whatever else NCCI might call them in trying to avoid its public meeting responsibility"); and id. at 538 (Order at 63) "despite NCCI's preferences to exclude the public"). These findings are irrelevant and distract from the real issue.

The gravamen is the doing of the very act itself rather than the motivation for the doing of the act. The determination of the applicability of the Sunshine Law is therefore not ascertained by whether the establishment of the Citizens' Planning Committee was a 'subterfuge to avoid the effect of the statute.'

⁵ The Prehearing Stipulation does not preserve as an issue whether section 627.091(6), Florida Statutes, requires that NCCI have a committee to consider all matters specifically and directly related to Florida rates.

IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353, 357 (Fla. 4th DCA 1973), approved and remanded sub nom. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).

The delegation to Mr. Rosen for this rate filing did not create a “committee of one”⁶ subject to the Sunshine Law by virtue of section 627.091(6). In support of ruling that the committee remained despite NCCI’s reorganization of its decision-making and delegation of sole authority to Mr. Rosen, the Order on Non-Jury Trial cites one paragraph of the Florida Government in the Sunshine Manual as “address[ing] the delegation of authority to a single individual” and apparently the application of the Sunshine Law to Mr. Rosen. R. 800 (Order at 25). This paragraph states only that “a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego.” Manual at 18. It does not address delegation to one person. Neither of the cases cited in that paragraph involve delegation to a single person: both involve delegations by a governmental body to an advisory council and the question of whether the latter

⁶ “Committee” is not defined in this section or the remainder of the Florida Insurance Code. “Where a statute fails to define a term, court may resort to a dictionary definition to determine the ‘plain and ordinary meaning’ of the statutory language.” Allstate Ins. Co. v. Rudnick, 761 So. 2d 289, 291 (Fla. 2000) (citing Green v. State, 604 So. 2d 471, 473 (Fla. 1992)). “Committee” has been defined to mean “a body of persons delegated to consider, investigate, take action on, or report on some matter.” Merriam Webster Online Dictionary 2017, <https://www.merriam-webster.com/dictionary/committee>. (January 5, 2017).

assumed the Sunshine obligations of the former. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974) (advisory committee established by town council); News-Press Publ'g Co., Inc. v. Carlson, 410 So. 2d 546 (Fla. 2d DCA 1982) (internal budget committee established by governing authority of hospital).

While direct authority for a one-person committee is absent from the Order on Non-Jury Trial, Mr. Fee cited below several opinions issued by the Attorney General on this issue, several of which state that “the Sunshine Law also applies when an individual has been delegated the authority to act on behalf of a public board or commission.” R. 472; see also AGO 84-54. The Office agrees with that statement of the law. However, it is not applicable here.

NCCI is not a public board or commission and is not performing a public duty. Therefore, no NCCI delegation of its authority, whether to an individual or a committee, carries with it obligations under the Sunshine Law by general operation of Article I, Section 24 of the Florida Constitution and section 286.011, Florida Statutes. Only one NCCI delegation of authority creates Sunshine Law obligations, and that is one to a specific committee with delegated responsibility under section 627.091(6), Florida Statutes.

B. NCCI Staff Review and Discussion of the Rate Filings Were Not Committee Meetings Subject to the Sunshine Law.

Mr. Fee did not specify in the Complaint or Prehearing Stipulation by name or description the group of persons currently at NCCI he alleged to be “the

committee” that met in the shade in violation of section 627.091(6), Florida Statutes. At the evidentiary hearing, Mr. Fee presented evidence of the process by which the subject rate filings were submitted and seemingly alleged that every meeting along the way was subject to the Sunshine Law because “whether it’s two people, whether it’s 12 people, whether it’s a hundred people, or whether it’s one person, that person is a committee subject to 286.” Tr. 16.

The Trial Court agreed with Mr. Fee that “the credible evidence shows NCCI clearly does use committees, with a series of meetings to finalize its rate filings.” R. 538 (Order at 62). In identifying those specific committees and meetings, the Court found that “clearly all of the NCCI meetings internally for Phase I, Technical Peer Review and Phase II for supervisory interaction violated both statutes [sections 286.011 and 627.091(6)].” *Id.* at 538-39 (Order at 63-64). None of these groups are committees that had meetings for purposes of invoking section 627.091(6), Florida Statutes.

Phase I meetings involve “a small group of NCCI regulatory services folks” getting together every year and determining issues to be addressed in the annual experience filing. Tr. 130-31. The testimony at the evidentiary hearing is undisputed, as recognized elsewhere in the Trial Court’s Order, that there was no Phase I meeting for the subject filings because they were not annual filings but were specifically a reaction to the Castellanos and Westphal decisions. R. 518 (Order at 43); T. 133.

The Trial Court's subsequent and contrary finding that a Phase I meeting was part of the process here at issue and violates the Sunshine Law must be disregarded.

There were Technical Peer Review meetings regarding both subject filings. The attendees at these meetings, with the exception to two NCCI regulatory employees (Ms. Lori Lovgren and Mr. Chris Bailey), were all NCCI actuaries. T. 128-30. Mr. Rosen, as lead actuary and the person responsible for the filings, presented his findings to the other actuaries, who had the opportunity to ask questions. Id. There were also Phase II meetings with respect to both filings. These meetings involved a smaller group of actuaries (including Mr. Rosen) explaining the filings to regulatory services folks with NCCI, who can ask questions to ensure they understand the filings. Tr. 130.

None of these groups had been delegated any responsibility for rate filings by NCCI, had any other decision-making authority, or took any vote or other formal action to approve or disapprove Mr. Rosen's presentation. The testimony of Ms. Lovgren, who attended Phase II and Technical Peer Review, was that those meetings were technical and informational in nature. Tr. 128-30 (Mr. Rosen explained "how he arrived at his number, what data he used, what methodologies he used" and "attendees had an opportunity to ask Mr. Rosen questions").

Meetings between a single decision-maker and a group formed to offer technical assistance are not subject to the Sunshine Law. Cape Publ'n, Inc v. City of

Palm Bay, 473 So. 2d 222 (Fla. 5th DCA 1985)2d 222 (Fla. 5th DCA 1985). In Cape Publication, the meetings at issue were interviews of prospective police chiefs by the city manager with the assistance of a committee formed to ask technical questions and offer comments. The City's charter “places the sole responsibility for the selection of a police chief in the city manager,” whereas “the [advisory] group was delegated no authority.” Id. at 223. The court held that these were not “meetings” under section 286.011, Florida Statutes, because the advisory board was established and served a fact-finding and not decision-making function.

The meetings here at issue were technical and informational involving a group assembled by the individual decision-maker, as was the situation in Cape Publication. There is nothing about the Technical Peer Review or Phase II meetings that involves decision-making and would subject them to the Sunshine Law pursuant to section 627.091(6), Florida Statutes. See Rowe v. Pinellas Sports Auth., 461 So. 2d 72, 75 (Fla. 1984) (“Even if we were to include the gatherings that occurred here under the definition of the Sunshine Law, these gatherings do not rise to the level of decision-making which is required to violate the act.”); Baker v. Warden, 333 So. 2d 97 (Fla. 2d DCA 1976) (committee of employees who met with Junior College President to provide factual background on hours and wages not subject to Sunshine Law).

C. The Word Committee Is Not “Irrelevant” To The Interpretation and Application Of Section 627.091(6).

There being no committee for purposes of section 627.091(6), Florida Statutes, the Sunshine Law analysis should conclude. However, the Trial Court continued in the Order far beyond the plain language of the statute and ruled “[s]eparately [that] whether NCCI had a ‘committee’ subject to section 627.091(6) is irrelevant to its obligation to conduct the decisional rate filing preparation meetings in public.” R. 537 (Order at 62) (emphasis added). The Circuit Court set aside the plain language of the statute by deeming the key word “irrelevant.”

“When the statutory language is clear, ‘courts have no occasion to resort to rules of construction – they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.’” Daniels v. Dept. of Health, 898 So. 2d 61, 64 (Fla. 2005) (quoting Nicoll v. Baker, 668 So. 2d 989, 990-91 (Fla. 1996). In so doing, courts adhere to the “elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.” Hechtman v. Nations Title Ins. of New York, 840 So. 2d 993, 996 (Fla. 2003) (citing Hawkins v. Ford Motor Co., 748 So. 2d 993 (Fla. 1999); see also Scherer v. Volusia City. Dep’t. of Corr., 171 So. 3d 135, 139 (Fla. 1st DCA 2015) (“No part of a statute, not even a single word, should be ignored, read out of the text, or rendered meaningless, in construing the provision.”)).

The Legislature imposed a specific duty on recognized rating organizations with respect to a “committee” by virtue of section 627.091(6), Florida Statutes, which may not be expanded into an unqualified “obligation to conduct the decisional rate filing preparation meetings in public” by simply writing that word out of the statute.

D. Section 627.093 Is Not at Issue and Does Not Provide an Independent Basis to Find the Sunshine Law Applicable to NCCI.

At places in the Order, the Trial Court places reliance on section 627.093, Florida Statutes, as the basis for applying the Sunshine Law to a broad range of meetings.

The Legislature has recognized the important role recognized rating organizations play, mandating in section 627.093, Florida Statutes, that the rating organizations comply with Florida’s Government in the Sunshine meeting requirements

R. 483 (Order at 8).⁷

The statute does not mention rating organizations or a mandate that they be subject to the Sunshine Law. Section 627.093, Florida Statutes, is a generally worded law that reads:

Application of s. 286.011 to workers’ compensation and employer’s liability insurances.—Section 286.011 shall be applicable to every rate filing, approval or disapproval of filing, rating deviation

⁷ As a threshold matter, section 627.093 is not listed in the Pre-Hearing Statement. Based on the legal authority set forth more fully infra, this statute not properly at issue as a basis for relief in this case.

from filing, or appeal from any of these regarding workers' compensation and employer's liability insurances.

This statute makes clear the application of the Sunshine Law to a range of filings and appeals. It does not expand application of these requirements to entities beyond government boards and commissions, such as rating organizations or insurers.⁸ Section 627.091(6), Florida Statutes, on the other hand, speaks directly to extending this reach to include one non-governmental entity: "the committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance rates in this state."

If section 627.093, Florida Statutes, made all meetings relating to workers' compensation insurance rate filings subject to the Sunshine Law, including those of rating organizations, section 627.091(6), Florida Statutes, and specific mention of the committee would be unnecessary or inconsistent with the general rule.

The Legislature is not assumed to pass unnecessary statutory subsections. See Alexander v. Booth, 56 So. 2d 716, 718 (Fla. 1952) ("This Subsection . . . was enacted for some purpose. We cannot assume that the Legislature would enact a law without some purpose in view."); State v. Goode, 830 So. 2d 817, 824 (Fla. 2002)

⁸ This provision was first enacted in 1979 and was applicable to the former Department of Insurance. Chapter 79-40, Laws of Florida. It is not known whether the Department had boards or commissions relating to workers' compensation insurance rate filings at that time.

(affirming the “basic rule of statutory construction [which] provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render a part of a statute meaningless”). The two statutory sections here at issue were originally passed as different sections of the same bill,⁹ lending further credence to the assumption that the Legislature did not pass either unnecessarily.

[W]hen seemingly inconsistent sections of a statute are part of the same legislative act, such sections must be construed together in order to ascertain the legislature's intent. In re Opinion to the Governor, 60 So. 2d 321, 324 (Fla. 1952). In other words, statutes passed during the same legislative session and relating to the same subject matter should be construed in *pari materia* and harmonized so as to give effect to each. Tamiami Trail Tours v. City of Tampa, 159 Fla. 287, 31 So. 2d 468 (1947).

Winthrop & Joseph, Inc. v. Marriott Resort Hosp. Corp., 695 So. 2d 789, 791 (Fla. 5th DCA 1997).

Construing these two sections together and giving effect to both leads to the conclusion that section 627.093, Florida Statutes, directs that the Sunshine Law applies to all public meetings defined in section 286.011, Florida Statutes, regarding workers' compensation insurance rate filings, and section 627.091(6), Florida Statutes, extends this reach to one specific type of otherwise private meeting.

⁹ Chapter 79-40, Laws of Florida.

On the other hand, a forced reading of the former to extend Sunshine Law requirements to rating organizations generally and the latter to extend those same requirements to the committee of a rating organization leads to apparent conflict. If these two provisions are found to conflict, the applicable rule of statutory construction would change but the result would remain the same.

“When reconciling statutes that may appear to conflict, the rules of statutory construction provide that a specific statute will control over a general statute.” Florida Virtual School v. K12, Inc., 148 So. 3d 97 (Fla. 2014), Id. at 102 (emphasis added) (citing, State v. J.M., 824 So. 2d at 105, 112 (Fla. 2002)). “The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.” McKendry v. State, 641 So. 2d 45, 46 (Fla.1994) (internal citations omitted). The application of the Sunshine Law in section 627.091(6), Florida Statutes, to a private entity is an exception to the general rule in section 627.093, Florida Statutes, that the requirements apply to public bodies.

II. THE SUNSHINE LAW DOES NOT APPLY TO MEETINGS BETWEEN THE OFFICE AND NCCI

The *sine qua non* of complaint Count II and the disputed issues in the Pre-Hearing Statement turned entirely on whether NCCI had a committee pursuant to section 627.091(6), Florida Statutes, that met in violation of the Sunshine Law. However, continuing beyond these specific issues, rating organizations, and committees, the Trial Court ruled that the Office violated Sunshine Law when it

engaged in a series of allegedly “secret” meetings with NCCI. This conclusion is contrary to the law and must be reversed.

A. The Complaint and Pre-Hearing Statement Do Not Contain Issues Regarding Direct Violations of the Sunshine Law by Actions of the Office.

The Office was named only in Count II of the complaint. A fair reading of Count II reveals that Mr. Fee only charged the Office with a derivative or imputed violation of the Sunshine Law based on violations of section 627.091(6), Florida Statutes, by NCCI. See R. 27; Complaint p. 22, ¶¶99-100. Such a reading of the complaint is reinforced by reference to the relevant general allegations incorporated into the complaint.

The factual allegations of violations of the Sunshine Law appear in subheadings F. (R. 15-16; Complaint pp. 10-11, ¶¶36-44) and G. (R. 16-17; Complaint pp. 11-12, ¶¶ 45-47). In subheading F, the complaint repeatedly refers to “committees” of NCCI that supposedly violated the Sunshine Law because of NCCI’s failure to provide notice and public participation of its internal rate filing process in violation of section 627.091(6), Florida Statutes. The salient factual paragraph (R. 16; Complaint ¶44) states that because “Plaintiff (a) did not receive notice or have an opportunity to participate in the committee meetings at which the rate at issue was discussed and decided” his due process rights were violated. Plaintiff reiterated this position in paragraph 47 (R. 17) where he alleged that he did

not have notice and opportunity to be heard because the “underlying NCCI committee meeting at which the Amended Rate filing . . . was discussed” (R. 17; Complaint p. 12, ¶46) was not noticed or open to the public. Finally, Plaintiff alleged that “notwithstanding NCCI’s complete failure to (1) provide a notice of any meetings at which the Amended Rate Filing was discussed [and] (2) open these meetings in public” . . . OIR could not consider NCCI’s Amended Rate Filing after the duly noticed August 16, 2016, public hearing conducted by Commissioner Altmaier.¹⁰ R. 21; Complaint p. 16, ¶68.

Comparing the relevant factual allegations to the allegations in Count II, it is clear that Mr. Fee based his claim of a violation of the Sunshine Law by the Office solely on an alleged violation of the Sunshine Law by NCCI in not complying with section 627.091(6), Florida Statutes, with respect to committee meetings. This was the only charge on which the Office was put on notice of the issues to be determined. There was nothing in the complaint alleging that the Office directly violated the Sunshine Law.

¹⁰ There is no dispute that Mr. Fee had notice and opportunity to be heard at the public hearing on August 16, 2016, and, indeed, Mr. Fee’s consultant actuary presented his position at that hearing. Jt. Ex. 6 at pp. 188-195.

At the conclusion of a hearing on motions to dismiss conducted October 10, 2016, the Trial Court stated that the issues to be tried would be those listed in the parties' pre-hearing stipulation.

[The October 6, 2016, (R. 192) Order on Expedited Status Hearing] does require the parties to submit a joint prehearing statement setting forth the issues of fact and law that are stipulated and those that are not, which would become the basis on which the case would go forward with the evidentiary hearing, so that would substitute for pleadings. . . . [Y]ou-all get together and submit a single joint prehearing stipulated statement as to what's stipulated to and what isn't, so the appellate court will have as full record as possible as to what the factual issues are that are in dispute and those that are not, and same thing with the legal issues. (Emphases added.) Oct. 19, 2016 Hearing Transcript Excerpt, p. 5 (part of supplemental record).

The agreed upon issues to be considered at the hearing were listed in the Pre-Hearing Statement, filed November 7, 2016, in paragraphs 1-22.¹¹ R. 456-58. None of the agreed upon issues in the Pre-Hearing Statement suggest any direct violations of the Sunshine Law by the Office. Mr. Fee attempted to raise issues in the Pre-Hearing Statement that were beyond the complaint, including the meetings between the Office and NCCI, all of which were objected to by the Office and NCCI. Mr. Fee never requested or was granted leave to amend the complaint to include these allegations. Thus, the only issues properly at issue and about which the Office was

¹¹ As to the remaining paragraphs, 23-26, their inclusion were subject to objection by either Plaintiff or Defendants. These objections were not resolved prior to the hearing.

on notice as being subject to dispute as set forth in the Pre-Hearing Statement did not involve direct violations of the Sunshine Law by actions of the Office.

While it mostly copied the agreed upon issues in the Order (R. 492-96; pp. 17-21), the Trial Court erred when it went beyond the Pre-Hearing Statement disputed issues. In reciting the “Events of This Year’s Rate Filing Process,” (R. 488; p. 13), the court went beyond the “NCCI rate related meetings” and added “NCCI officials had a series of meetings . . . in which the impending rate filings were discussed with OIR regulatory staff.” R. 489; p. 14, ¶26. This was the first time (after the evidentiary hearing) the Office was placed on notice that regularly conducted meetings and communications between a regulator (Office) and a regulated entity (NCCI) formed a factual basis for finding a Sunshine Law violation by the agency. See also, R. 491; p. 16, ¶32 (NCCI held a number of meetings and exchanged information with OIR staff in reviewing and analyzing the rate increase recommendations.).

Expansion of the issues of fact and law to be determined beyond those stated in the Pre-Hearing Statement is improper. ““A pretrial stipulation limiting the issues to be tried is ‘binding upon the parties and the court, and should be strictly enforced.’” S&M Transp., Inc. v. Northland Ins. Co., 41 Fla. L. Weekly D2696a (Fla. 5th DCA) (on rehearing).

Dec. 2, 2016 (quoting LPI/Key W. Assocs. Ltd. v. Beachcomber Jewelers, Inc., 77 So. 3d 852, 854 (Fla. 3d DCA 2012), (quoting in turn, Broche v. Cohn, 897 So. 2d 124, 127 (Fla. 4th DCA 2008)): see also, Knight v. Walgreens, 109 So. 3d 1224, 1228 (Fla. 1st DCA 2013) (“Because due process rights are implicated, a party has a right to rely on the issues framed in the pretrial statement.”); Marin v. Aaron’s Rent to Own, 53 So. 3d 1048, 1049, 1050 (Fla. 1st DCA 2010) (same; “never a court’s function to rewrite the terms of an agreement to make it more reasonable”).

Because these matters were not raised in the Pre-Hearing Statement (or the Complaint), none of the findings and conclusions regarding meetings between the Office and NCCI can be used as any basis for a Sunshine Law violation.

B. Communications between Office staff and NCCI are not Subject to the Sunshine Law.

On the merits, legal conclusions that in-person meetings and those conducted via telephone between Office staff and NCCI employees are erroneous as a matter of law for all of the reasons discussed above. NCCI is subject to the Sunshine Law only for committee meetings under section 627.091(6), Florida Statutes. The various NCCI personnel who were in the meetings with the Office, who were not the same on all occasions, did not individually or collectively comprise a “committee” as described above.

The Sunshine Law does not apply to Office staff individually or collectively, or to the Commissioner, unless part of a board or commission. There are no attendees

listed for any of these “numerous secret, non-noticed meetings between NCCI and OIR” found to be “uncurable violations of the Sunshine Law” who would subject the meeting to section 286.011, Florida Statutes. R. 535 (Order at 60).

III. AGENCY ACTIONS OF THE OFFICE ARE NOT VOID OR VOIDABLE BY VIRTUE OF ALLEGED SUNSHINE LAW VIOLATIONS BY NCCI.

The Office is named only in Count II of Mr. Fee’s Complaint, which is titled “Violation of Sunshine Law.” Nowhere in Count II, or incorporated paragraphs one through sixty-eight, does Plaintiff allege that the Office directly violated the Sunshine Law, Section 286.011, Florida Statutes. Instead, Mr. Fee alleges that “[s]ince NCCI failed to comply with the Sunshine Law, the Amended Rate Filing should *not* be considered for approval by the OIR’s Commissioner at the August 16, 2016 hearing or otherwise.” R. 105 (Complaint ¶ 99) (italics and bold in original, underscoring added). As noted above, these allegations of a violation of the Sunshine Law made by Plaintiff against the Office make only a derivative claim: that is, actions of the Office are alleged to be tainted by substantive violations of the Sunshine Law committed by NCCI.¹²

¹² The Trial Court’s Order also ruled that non-noticed meetings involving the Office violated the Sunshine Law. These rulings stray beyond the allegations in the Complaint, are improper, and are fully addressed infra.

The Sunshine Law generally may only “invalidate the actions of a public body which are the result of secret meetings of that body or members thereof.” IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353, 356 (Fla. 4th DCA 1973), approved and remanded sub nom. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974). In only limited circumstances may the Sunshine Law violations of an entity separate from a government agency be attributed to that agency and used as a basis to void government action. None of those circumstances, all of which focus on the relationship between the agency and the non-public entity and any public functions performed by the latter, are present with respect to NCCI and the Office. Thus, even if some action or inaction of NCCI is found to violate the Sunshine Law, that violation is not legally attributable to the Office and is not a basis to void its Orders.

A. NCCI Is Not Performing a Public Function or Duty in Preparing and Submitting Rate Filings On Behalf of Workers’ Compensation Insurers.

While the exact language in the controlling cases differs slightly, the general rule is clear: a non-public entity is subject to the Sunshine Law and its actions attributable to a government agency only in circumstances where it is performing a public purpose or some part of the agency’s decision-making process.

This principle was discussed at length in Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974). In that case, the Florida Supreme Court held that a

citizens' planning committee was subject to the Sunshine Law. The Court found that the committee was "conceived and formed by the Town Council" and was "a subordinate group or committee selected by the governmental authorities" before ultimately concluding that "[t]he citizens' planning committee was an arm of the Town Council." Id. at 476. The Court emphasized that the committee meetings were part of the government's "decisional process"¹³ and should have been conducted in the sunshine. Id. at 477; see also Spillis Candela & Partners, Inc. v. Centrust Savings Bank, 535 So. 2d 694, 695 (Fla. 3d DCA 1988) (finding a Sunshine Law violation where in a private meeting "[t]he committee . . . made a ruling affecting the decision-making process and it was of significance").

In Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., the Florida Supreme Court again considered the scope of the Sunshine Law. 729 So. 2d 373 (Fla. 1999). The Court in West Volusia held that a private nonprofit organization that operated a hospital it leased from a hospital taxing authority was subject to the Sunshine Law. Id. In so holding, the Court emphasized "the [taxing] Authority's delegation of the performance of its public purpose to West Volusia, Inc." as a key factor. Id. The Court cited with approval its holding in Wood v. Marston, where the

¹³ "[T]he Council delegated to the committee much of their administrative and legislative decisional zoning formulation authority which is ordinarily exercised by a city-governing body itself" Id. at 474-75.

Sunshine Law was found to apply based on a “delegation of a portion of the decision-making authority to an advisory group.” 442 So. 2d 934, 939 (Fla. 1983) see id. at 938 (“the committee performed a policy-based, decision-making function delegated to it by the president of the university”).

Because these types of actions taken by these entities are, in reality, official government actions, they are subject to being declared void ab initio if undertaken in violation of the Sunshine Law. See Gradison, supra, at 477-78; Silver Express Co. v. The Dist. Bd. Of Lower Tribunal Trustees of Miami-Dade Cmty. College, 691 So. 2d 1099, 1101 (Fla. 3rd DCA 1997). NCCI and its preparation of a rate filing have virtually nothing in common with the advisory boards and actions taken by them as discussed in these cases.

NCCI exists and functions independently of the Office. NCCI committees are not appointed, supervised, or staffed by the Office. NCCI prepared and submitted the subject rate filings as a licensed rating organization authorized by the Legislature to make those filings on behalf workers’ compensation insurers. § 627.091(1) & (4), Fla. Stat. None of these rating organization functions involve the Office, which is not authorized to make workers’ compensation rate filings on behalf of any companies.

The Office is authorized by the Legislature “to specifically approve the filing before it becomes effective” § 627.101(2), Fla. Stat. The Legislature has not

authorized the Office to further delegate this authority to NCCI or its committees. These specific statutory delineations of authority provide a clear distinction between the functions of NCCI to prepare and submit rate filings and duties of the Office to review and (dis)approve them.

The statutory requirement that a very specific type of meetings be conducted in accordance with section 286.011, Florida Statutes, does not blur this line between the respective functions and duties of NCCI and the Office. This unique¹⁴ statute does but one thing: it subjects “the committee” of a rating organization to the Sunshine Law in the performance of a purely private function, the consideration of matters directly and specifically pertaining to Florida workers’ compensation insurance rate filings. This extension of the Sunshine Law is procedural only and does not substantively transform actions of an NCCI committee to public actions attributable to the Office.¹⁵ Absent NCCI performing such a duty on behalf of the Office with respect to the subject filings, there is no basis to find its agency action void.

¹⁴ The procedural requirements of section 286.011, Florida Statutes, have not been applied to any other private entity by the Legislature.

¹⁵ The rating organization is solely responsible for providing notice of meetings under section 627.091(6), Florida Statutes. The Office receives notice but is not charged with ensuring meetings are otherwise noticed and conducted in accordance with the Sunshine Law, and is not required by statute or rule to participate or otherwise be involved in meetings.

B. The Trial Court Erred in Ruling That NCCI Was The “Decision Maker” For Workers’ Compensation or Performed a Public Duty in Submitting a Rate Filing.

The Trial Court’s Order seems to conclude that two other activities of NCCI illustrate it was performing a public duty. First, after discussing a series of meetings between Office staff and representatives of NCCI, the Trial Court characterized them as “meetings at which decision maker NCCI [through its staff] discussed and decided the substance of the rate increases NCCI proposed.” R. 534 (Order at 58). It is accurate to state that NCCI decided the substance of the rate increase it proposed. It is without record support to infer that NCCI decided on the rate increase approved.¹⁶ The prior is a private function, the latter public and exercised by the Offices.

The Order continues as follows:

In this case, when preparing a further amended rate filing directed by OIR [one NCCI has been told would result in the largest workers’ compensation rate increase in several years], NCCI was acting at the direction of the OIR while acting on behalf of its subscribers.

Id. at 542 (Order at 66). How “acting at the direction” of the Office is the Sunshine Law equivalent of performing a public duty for purposes of the Sunshine Law is not further explained in the Order on Non-Jury Trial.

¹⁶ As discussed throughout this Initial Brief, Mr. Rosen was delegated sole authority to make the decisions on the subject rate filings. Any conclusion or inference to the contrary lacks any record support.

In its Order on Rate Filing, the Office wrote as follows: "[i]f the Filing were amended, an alternative rate increase of 14.5 percent is justified." Jt Ex. 8 at 6. NCCI was not directed to amend its filing; the filing was disapproved. NCCI was informed that it could amend its rate filing. NCCI was also informed that it could file a petition under chapter 120, Florida Statutes. See Jt Ex. 8 at 10 (notice of rights). NCCI's election of which avenue to pursue was not in any way the performance of a public duty.

IV. THE PUBLIC HEARING BY THE OFFICE CURED ANY SUNSHINE VIOLATIONS BY NCCI

Where a violation of the Sunshine Law is found to have occurred, a full, open subsequent public meeting conducted in accord with the Sunshine Law can "cure" that violation. Tolar v. School Bd. of Liberty County, 398 So .2d 427, 429 (Fla. 1981) That subsequent hearing will act as a cure unless it is "merely a ceremonial acceptance" or "perfunctory ratification of secret decisions." Monroe County v. Pigeon Key Historical Park, Inc., 647 So. 2d 857, 868 (Fla. 3d DCA 1994). The result of a cure is that the ultimate decision will not be declared void despite the earlier Sunshine Law violation. Gradison, 296 So. 2d at 477.

The basic Sunshine Law violation alleged by Mr. Fee is the failure of NCCI to give public notice of one or more internal (committee) meetings at which the rate filings were discussed. Thus, the "ill" caused by the violation that is subject to being cured is the missed opportunity to attend two question and answer sessions with

NCCI actuaries regarding the rate filings and one meeting where several of these same actuaries and members of NCCI regulatory team discuss how to explain this filing to others.

The August 16, 2016, public hearing conducted by the Office¹⁷ cured these ills and any Sunshine Law violation(s). The meeting was properly noticed in the Florida Administrative Register on July 7, 2016. R. 453. By August 2, 2016, all materials that had been submitted by NCCI to the Office for the subject rate filings through that date were made publicly available on the Office's website. Tr. 184. Also available on the website at that time were all documents submitted by NCCI for every rate filing back to 2001 and videos of all past rate hearings back to 2008. Tr. 182-83.

This hearing provided the public a full opportunity to hear the subject rate filings discussed, including a presentation by NCCI's actuary, Mr. Rosen, who was questioned by Commissioner Altmaier and the Office' actuary, Ms. Cyndi Cooper. Jt Ex. 6 at 60-102. For those who could not be in Tallahassee on August 16th, the

¹⁷ In appropriate circumstances, the cure meeting can be conducted by a governmental entity separate from the one that committed the Sunshine Law violation. In Pigeon Key, a meeting by the County Commission, which had ultimate decision-making authority on the issue at hand, cured an earlier violation committed by an advisory committee. 647 So. 2d at 868. In this case, a cure meeting by the Office, which has decision-making authority on approving rate filings, is appropriate under the very same reasoning as Pigeon Key.

public hearing was streamed live on the internet on “The Florida Channel.” Tr. 184. Those who were present at the hearing were given the opportunity to comment. Id. at 182. Everyone who filled out a speaker card was given their time at the podium. Id.¹⁸ The record was held open for one week after the public hearing and written comments allowed to be submitted via the Office’s website through 5:00 p.m. on August 23, 2016. Id. at 184.

Importantly for purposes of this alleged violation and cure, the Sunshine Law (section 286.011, Florida Statutes) does not contain any requirements that public participation be allowed at meetings subject to the Sunshine Law: the only requirements are that meetings be noticed and open to the public and minutes be taken. Provisions regarding public participation are set forth separately in section 286.0114, Florida Statutes. These requirements are not incorporated into section 627.091(6), Florida Statutes, as applicable to committees of rating organizations. These requirements are applicable on their own terms only to “a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision.” § 286.0114(1), Fla. Stat.

¹⁸ The Florida Insurance Consumer Advocate was also present but asked no questions and offered no comments when given the opportunity by the Commissioner. Tr. 133.

NCCI is under no Sunshine Law requirement to provide opportunity for public participation at its committee meetings. By providing this opportunity at the August 16th public hearing, the Office provided participation greater than that which would have been guaranteed by the Sunshine Law before an NCCI committee. Coupled with the notice given and information provided, the Office's meeting was more than a sufficient cure for any Sunshine Law violations by NCCI.

CONCLUSION

The only charge against the Office was a derivative or imputed violation of the Sunshine Law by NCCI. The foundation for such a violation to be found – an NCCI committee with responsibility for rate filings – was not proven. NCCI does not currently have such a committee and has not for over twenty years. The Trial Court erred when it ruled various gatherings of NCCI staff to be one or more committees. This error was greatly compounded when the Trial Court deemed the word “committee” irrelevant, construed the statute absent that word to apply broadly to all meetings regarding rate filings, and found every interaction between NCCI and the Office subject to the Sunshine Law.

Any Sunshine Law violation by NCCI cannot be legally imputed to the Office and used as a basis to void the Order on Rate Filing. To the extent a violation is found and is imputed to the Office's decision, it was “cured” by the Office's August 6, 2016, four-hour public hearing on whether NCCI's rate filing should be

approved or disapproved. The public hearing was the gold-standard for transparency.

Because of these and other matters argued herein, the Order on Non-Jury Trial and Final Judgement Providing Declaratory and Injunctive Relief rendered November 23, 2016, by the lower tribunal should be reversed and entry of final judgment in favor of the Office should be directed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants', Office of Insurance Regulation's and Commissioner David Altmaier's, Initial Brief has been furnished by e-mail on January 11, 2017, to:

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