

**Roland and Janice Hussey *d/b/a*
HUSSEY'S PAINT AND DECORATING**

v.

HANOVER INSURANCE COMPANY

and

**NATIONAL COUNCIL ON
COMPENSATION INSURANCE**

Docket NO. INS-02-504

DECISION AND ORDER

Roland and Janice Hussey, *d/b/a* Hussey's Paint and Decorating, filed a Petition with the Superintendent, pursuant to 24 A M.R.S.A. §§ 12-A, 229, and 2320 and Bureau of Insurance Rule 450, Article I, § 4(B), contending that Hussey Paint's workers' compensation insurance premiums are excessive as a result of an experience modification that is based on overstated incurred loss figures. Because Hussey Paint has presented credible evidence that Hanover Insurance Company used incorrect information to calculate the loss incurred on Hussey Paint's most severe claim, and Hanover failed to appear to rebut that evidence, the Petition is granted.

The claim in question arose when G.L., a Hussey Paint employee, broke a bone at work. The injury ultimately required surgery, complications developed, and a second surgery was required. That surgery was successful, and G.L. has returned to work. The claim has now been closed, with paid losses substantially below the reserves previously estimated by Hanover, which insured Hussey Paint at the time of the injury and has been responsible for the ongoing servicing of this claim.

An adjudicatory hearing was held before the Superintendent on April 22, 2002.¹ Roland Hussey testified on behalf of Hussey Paint and submitted documentation. With the consent of the Petitioner, a written appearance was entered by the National Council on Compensation Insurance ("NCCI"), designated by the Superintendent pursuant to 24 A M.R.S.A. § 2382-B as the advisory organization responsible for the administration of the workers' compensation experience rating plan. Hanover did not appear. Hussey Paint's current insurer, Excelsior Insurance Company was not named in the Petition and therefore is not a party to this proceeding.²

¹Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decisionmaking authority.

² Excelsior is a member of the Peerless family of companies within the Liberty Mutual Group.

In its written submission, NCCI provided copies of the pertinent provisions of the Uniform Experience Rating Plan, and official notice was taken of the terms of the Plan. As NCCI correctly explains, the risk of a particular policy must be evaluated at the time the policy is issued. One factor used in evaluating that risk is the insured's recent claims history. It is impossible to know the true size of a claim until the claim is closed, which is often many years after the date of injury - if the claim is still open, incurred loss measurement must rely in part on the company's reserve; that is, its estimate of the future payments still to be made on the claim. Nevertheless, it is universally recognized that estimated losses on recent claims are a better predictor of current exposure than actual losses on ancient claims.

Therefore, the Plan provides for experience rating to be based on a "snapshot" of estimated incurred losses on recent claims. As NCCI points out, there are few exceptions to the principle that subsequent increases or decreases in the reserves will only impact the employer's future experience rating, and will not result in retroactive adjustment of experience ratings already in place. Making the experience rating of an in-force or expired policy a moving target would impose significant costs and uncertainties on both insurers and policyholders, and would not measurably increase the accuracy of the rating system.

However, one of those limited exceptions to the principle of prospectivity is that experience ratings must be corrected if the insured demonstrates to the satisfaction of the Superintendent "that the information used by the insurer in estimating the incurred loss was incorrect and the insurer knew or should have known at the time of the required valuation date that the information was incorrect." Bureau of Insurance Rule 450, Article I, § 4(A).

Here, Hussey Paint's current experience rating reflects a substantial reserve for future payments on the claim of G.L., although he returned to work on a permanent basis months before the experience rating was issued. This is not necessarily inappropriate, if G.L.'s prompt and thorough recovery was unexpected and Hanover still reasonably believed on the valuation date that future medical treatment or wage loss benefits were likely. In this case, though, it is uncontested that Hanover took the reserve off and reported the claim as closed less than a month after the experience rating was issued. This supports an inference that Hanover already knew or should have known, as of the required valuation date, that there were no likely future losses on the claim, and that the reserve was therefore incorrect information within the meaning of Rule 450. Because Hanover failed to appear, that inference must be drawn in favor of the Petitioner.

It is therefore *ORDERED* that NCCI shall promptly recalculate Hussey Paint's current experience rating, revising the incurred loss figure for the G.L. claim to reflect paid losses only, and shall promptly advise Hussey Paint's current insurer to recalculate the premium for Policy Year 2002-03 accordingly.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24 A M.R.S.A. § 236 (2000) and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by the Superintendent's decision may initiate an appeal on or before June 4, 2002. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

APRIL 25, 2002

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER