GILBERT LAW OFFICES, P.A.	]	
	]	
v.	]	
	]	**ORDER ON MOTION FOR SUMMARY ADJUDICATION**
NATIONAL COUNCIL ON COMPENSATION INSURANCE, *et al.*	]	
	]	
Docket NO. INS-99-2	]	
	]	

The parties have filed cross-motions for summary adjudication in this proceeding. After reviewing the submissions of the parties and the stipulated facts, I have concluded that the issues in this case turn on questions of fact that would not be appropriate to resolve without hearing. Therefore, for the reasons explained more fully below, all motions for summary judgment are denied with the exception of MEMIC's request for a ruling that it does not have an affirmative duty to provide unsolicited information to policyholders on how to restructure their operations to minimize insurance premium, and the Respondents' request for a ruling that if any structural changes are ordered to the rating plan, they will apply only prospectively to policyholders other than the Petitioner.

The Payroll Cap

The central issue in this case is the method of defining the basis for workers' compensation premium calculations. Each side has submitted a persuasive criticism of the other side's method of choice.

On the one hand, NCCI has submitted unrefuted actuarial evidence that loss exposure per worker is not directly proportional to the maximum weekly indemnity benefit per worker. In particular, NCCI points out that accident frequency can be expected to be roughly proportional to hours worked. For this reason, if payroll is to be used as the premium base, applying a cap as low as the one proposed by the Petitioner may have a serious distorting effect. The Petitioner's illustration comparing the benefits paid to the employees of two hypothetical law firms in the event of a mass disaster ignores the fact that the risk of mass disasters does not typically represent the bulk of a law firm's workers' compensation exposure.

In addition, although some of NCCI's objections appear to be exaggerated, the increased costs and decreased verifiability of a more complex formula must be given due consideration. It is also important to remember that the manual rate per $100 of payroll is only the beginning of the process. Even if that calculation tends to overstate a particular employer's actual loss exposure, the experience rating plan is designed to reduce the danger of an unfairly high premium charge.[1] Furthermore, in a competitive market, employers that are better risks than the formula calculations would indicate have the opportunity to participate in schedule rating and other premium credit plans and to seek coverage from carriers with more selective underwriting practices and commensurately lower rates.

Because the Petitioner has not shown that any proposed alternative system would be any more accurate than the current system, the Petitioner's motion for summary adjudication must be denied. Nevertheless, the Petitioner has pointed out what appear to be significant flaws in the current system, which cannot be dismissed without further analysis merely on the truism that no rating plan can be perfect.

In particular, the premium Petitioner would be charged is subject to wild variation depending on whether the highest-wage workers are treated as partners, corporate executive officers, or employees. This variation does not seem to have any rational relationship to exposure, as was noted in *Joyce, Dumas, David & Hanstein, P.A. v. MEMIC*, No. INS-94-15.

NCCI has not provided any meaningful explanation of how it decides which classifications are subject to payroll caps at the highest levels and which ones are not. NCCI acknowledges that some sort of payroll cap or other alternative premium calculation formula is appropriate when "it is expected that compensation for a small number of individuals will be substantially different from the average for the class as a whole (as in the case of executive officers, or star athletes)." This rationale would seem on its face to apply equally well to attorneys, and to other high-wage classifications as well. Although the existing payroll cap for executive officers might be a sensible baseline figure, it may be productive to explore whether a higher or lower cap might better balance predictive power and the costs of administering the system and verifying the information. It might also be considering formulas other than a flat dollar rate per unit of (capped or uncapped) payroll.

The imputed wage for partners and sole proprietors, however, does not appear to be an appropriate alternative, at least in its present form. NCCI justifies this approach by citing the difficulty in separating the owner's wage from the owner's profit, and the ease with which such figures can be manipulated when the owner and employee are the same legal entity.[2] However, the figure currently used may be patently unrealistic in the majority of cases in which the owner works full time at the business. Calculating an appropriate "wage substitute" may be a conceptually difficult task, but the Workers' Compensation Board manages to do it when a sole proprietor or partner makes a claim for benefits, and greater consistency between the imputed wage used in benefit calculations and the imputed wage used in premium calculations would seem to be a desirable goal.

Finally, it should be noted that the Petitioner has not stated a valid claim that the rates are "excessive,"[3] nor that the rate structure discriminates "against high-wage employees." The rates are not claimed to be excessive because the Petitioner is not claiming that rates should be reduced across the board or that its rates should be reduced while leaving other employers' rates in place. And the rating practices in question are directed against employers, not employees, since it is employers who pay workers' compensation premium. However, this is a matter of form rather than substance, since the Petitioner has clearly stated a claim that the rate structure discriminates unfairly against high wage employers. NCCI's assertion that "Although an occasional law office might be benefitted (or be harmed) by such a change, on average very little change would occur, and in aggregate no change at all," is

irrelevant to the issue in this case and is at best obtuse, since the Petitioner has clearly alleged that it is precisely the sort of "occasional" office that is harmed.

Other Issues

The parties disagree as to who has the burden of proof. In general, the burden is on the party seeking to change the terms of the existing contractual arrangement. *CWCO, Inc. v. MEMIC,* No. INS-93-89, *aff'd on other grounds sub nom. CWCO, Inc. v. Superintendent of Insurance,* 703 A.2d 1258, 1997 ME 226. The Petitioner has not demonstrated any reason why any exception should apply.

MEMIC requests dismissal from all claims relating to the rating plan itself, on the ground that NCCI is the real party in interest except as to the factual issues regarding the classification of Mr. Greif and Ms. Gilbert. That motion to dismiss is denied because MEMIC is a necessary party to the extent that this action seeks reformation of a contract between the Petitioner and MEMIC.

Peggy Gilbert's status clearly raises triable issues of fact on both sides. Although MEMIC notes that the Petitioner did not support its assertions with affidavits, the Prehearing Order expressly provided that such affidavits are not required at this stage.

It would be premature to rule that the claim that Arthur Greif should have been classified as an executive officer is barred as a matter of law. However, the relevant issues in dispute are considerably narrower, since it is uncontested that Mr. Greif was not in fact an executive officer at any relevant time. Although the Petitioner asserts that it would have appointed Mr. Greif to an executive position if the insurance producer had given better advice, MEMIC responds that such advice does not fall within the scope of any duty MEMIC owes to its policyholders and applicants. The exact scope of the producer's duty as an insurance professional to offer skilled advice is not the issue here, but rather, which of the producer's acts or omissions may properly be attributed to MEMIC. There is no allegation that MEMIC violated any express duty to disclose specific information, and the alleged omissions in MEMIC's general descriptions of coverage do not as a matter of law rise to the level of misrepresentation or deception. However, the Petitioner appears to be making the further allegation that the producer refused to answer specific requests relating to the terms of coverage, which were addressed to him in his capacity as a representative of MEMIC. If the Petitioner is indeed making such a claim and can support it with an adequate and credible factual foundation, then the Petitioner has raised a triable issue of fact.

Finally, the Respondents request a ruling that any relief be prospective rather than retrospective. If the Petitioner prevails and relief is ordered on a classwide basis pursuant to 24-A M.R.S.A. § 2319, such relief will be exclusively prospective pursuant to 24-A M.R.S.A. § 2319(3). However, if the Petitioner is able to prove that its premium was set on the basis of erroneous factual information or in violation of 24-A M.R.S.A. §§ 2303(1)(G), 2382, 2382-B, or other applicable law, retrospective relief may be appropriate.

Order

It is therefore *ORDERED:*

1. The Respondents' motions for summary adjudication are *GRANTED* to the following extent: first, that MEMIC has no duty to offer skilled advice on techniques for reducing the insured's premium; and second, that if any structural changes are ordered to the rating plan, they will apply only prospectively to policyholders other than the Petitioner. All motions for summary adjudication are otherwise *DENIED.*
2. If the parties choose to proceed to hearing, a second prehearing conference will be held in early August, to discuss procedures for discovery by the parties and by Bureau staff, to determine whether the issues in dispute may be further narrowed before the hearing through stipulations or partial summary adjudication, and to the extent feasible at that time to plan the hearing schedule.

This is an interlocutory order and is not final agency action within the meaning of the Maine Administrative Procedure Act, and therefore is not subject to appeal at this time. A notice of appeal rights will be provided with the final decision in this matter, and issues decided in this Order that are not rendered moot by the final decision may be appealed at that time.

[1] Premium credits are available for employers with good safety records that are too small to be experience-rated.

[2] As NCCI has observed, allocation between wages, bonuses, dividends, and retained profits can be equally arbitrary in the case of closely held corporations, but the corporate formalities do require that the allocation be made in a more formal and internally consistent manner.

[3] Therefore MEMIC's conclusory affidavit that this policy was issued in the voluntary market is moot, and it is unnecessary to order MEMIC to provide foundational evidence sufficient to provide plausible support for its claim.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

July 14, 1999

NANCY H. JOHNSON
DESIGNATED HEARING OFFICER