

AUG 31 2009

BEFORE THE DEPARTMENT OF INSURANCE
STATE OF NEBRASKA

FILED

IN RE WORKERS' COMPENSATION)
APPEAL OF C-MIX, LLC)

FINDINGS OF FACT,
DISCUSSION, CONCLUSIONS OF
LAW, RECOMMENDED ORDER,
AND ORDER

CAUSE NO. I-80

I. STATEMENT OF THE CASE

This case comes before Samuel Van Pelt, a hearing officer duly appointed by the Director of the Nebraska Department of Insurance, upon an appeal by C-Mix, LLC, ("C-Mix") of a decision of the Nebraska Internal Panel, ("Panel") of the National Council on Compensation Insurance, Inc., ("NCCI").

Commencing at 12:01 a.m. on November 14, 2007, C-Mix was provided coverage under the Nebraska Workers' Compensation Plan ("NWCP") by the Travelers Indemnity Company ("Travelers"). Travelers is the NWCP insurer and plan administrator effective January 21, 2005, the date the Director of Insurance entered into an agreement ("Agreement") with Travelers to provide workers' compensation insurance to assigned risk employers under the NWCP, pursuant to *Neb. Rev. Stat. § 44-3,158*.

Before coverage was issued, C-Mix requested a ruling from NCCI on the combinability of its experience with that of C-Tec, Inc. ("C-Tec"). This request was made on October 4, 2007. On October 15, 2007, NCCI ruled that the two companies were not held by a common majority ownership for experience rating purposes. The decision resulted in a 1.0 experience modifier assigned to C-Mix.

C-Mix applied for coverage in NWCP and Travelers issued the insurance binder to C-Mix on November 14, 2007. Thereafter, Travelers requested information from C-Mix regarding its business, to which C-Mix responded on

December 21, 2007. This response and other evidence gathered by Travelers raised questions regarding the correctness of the combinability ruling of October 15, 2007. Travelers submitted to NCCI the evidence substantiating its concerns and requested a review and reconsideration of the combinability determination.

On March 10, 2008, NCCI responded with a ruling that the two companies' experience was combinable, and that such ruling superceded the ruling of October 15, 2007. C-Mix appealed this ruling to the NCCI on March 19, 2008. On May 5, 2008, NCCI affirmed its decision of March 10, 2008, and stating that part of the basis for its decision was that a new entity was formed by C-Mix on November 1, 2007. C-Mix appealed this ruling to the Panel, which held a hearing on September 16, 2008. On September 18, 2008, the Panel set forth in more detail the basis of its findings and passed a resolution that the ownership ruling that combined the experience of C-Tec with C-Mix was affirmed as correct. On October 17, 2008, C-Mix appealed the Panel's decision to the Department.

On June 4, 2009, the parties agreed to submit this appeal to the hearing officer upon a stipulation of facts followed by briefs. C-Mix's brief was received on June 2, 2009. Travelers' answer brief was received on June 23, 2009. C-Mix's reply brief was received on June 30, 2009. A brief from NCCI relating to its status as a party to this appeal was received on June 23, 2009. A supplemental memorandum of Travelers was received on July 16, 2009. Upon a consideration of the above stipulation of facts and briefs, the hearing officer makes the following Findings of Fact, Discussion, Conclusions of Law, and Recommended Order to the Director.

II. FINDINGS OF FACT

1. The statements set forth in Paragraph I, Statement of the Case, above are incorporated herein as findings of fact.

2. C-Mix is a Nebraska limited liability company whose Articles of Organization were filed on July 11, 2006, and is currently in good standing with the Nebraska Secretary of State. C-Mix is wholly owned by Amy Wurst.

3. C-Tec is a Nebraska corporation whose Articles of Incorporation were filed on March 23, 1995, and is currently in good standing with the Nebraska Secretary of State. C-Tec is wholly owned by Greg Wurst.

4. Exhibit A attached to the Stipulation of Facts is a true and accurate copy of the ERM-14 submitted on behalf C-Mix and C-Tec to NCCI on or about October 4, 2007.

5. Exhibit B attached to the Stipulation of Facts is a true and accurate copy of the combinability ruling dated October 15, 2007, from NCCI stating that C-Mix and C-Tec were not combinable.

6. Exhibit C attached to the Stipulation of Facts is a true and accurate copy of the Insurance application dated October 29, 2007, which was submitted to Travelers by C-Mix.

7. Exhibit D attached to the Stipulation of Facts is a true and accurate copy of the temporary insurance binder between Travelers and C-Mix dated November 14, 2007.

8. Exhibit E attached to the Stipulation of Facts is a true and accurate copy of the Employee Leasing Agreement between C-Mix and C-Tec dated November 26, 2007.

9. Exhibit F attached to the Stipulation of Facts is a true and accurate copy of a letter dated January 23, 2008, from Travelers to NCCI asking NCCI to reconsider the October 15, 2007, combinability ruling regarding C-Mix and C-Tec.

10. Exhibit G attached to the Stipulation of Facts is a true and accurate copy of the combinability ruling dated March 10, 2008, from NCCI superceding its

October 15, 2007, combinability ruling and stating that C-Mix and C-Tec were combinable based on common ownership.

11. Exhibit H attached to the Stipulation of Facts is a true and accurate copy of C-Mix's letter to NCCI dated March 19, 2008, requesting an appeal of the combinability ruling.

12. Exhibit I attached to the Stipulation of Facts is a true and accurate copy of the Membership Unit Purchase Agreement dated April 12, 2008, between Greg J. Wurst, Trustee of the Greg J Wurst Revocable Trust and Amy R. Wurst, Trustee of the Amy R. Wurst Revocable Trust.

13. Exhibit J attached to the Stipulation of Facts is a true and accurate copy of the ERM-14 submitted on behalf of C-Mix and C-Tec, to NCCI on or about April 12, 2008.

14. Exhibit K attached to the Stipulation of Facts is a true and accurate copy of the combinability ruling dated May 5, 2008, from NCCI superceding its previous combinability rulings and stating that C-Mix and C-Tec were combinable based on Rule 3-C-1-a.

15. Exhibit L attached to the Stipulation of Facts is a true and accurate copy of the Case Decision released September 18, 2008, for the September 16, 2008 hearing in Nebraska Internal Review Panel Case Number NE-RP-03-2008.

16. C-Tec was insured by Travelers through the Nebraska Workers' Compensation Agreement Assigned Risk Pool, Policy 6-KUB7802B57 from June 17, 2005, to November 7, 2007.

17. As of November 7, 2007, C-Tec had been assigned a 1.25 experience modifier.

18. C-Mix obtained a policy of insurance with Travelers, Policy No. 0475M190 on November 14, 2007. This C-Mix policy was also obtained through Travelers through the Nebraska Workers' Compensation Assigned Risk Pool.

19. The description of operation and class codes requested by C-Mix were the same as C-Tec's. C-Mix leased employees to C-Tec. C-Mix had no other customers to whom it leased employees other than C-Tec.

20. As of July 11, 2006, both C-Mix and C-Tec utilized P.O. Box 363, York, NE 68467 as a post office box. As of September 15, 2006, C-Tec and C-Mix utilized 1928 South Lincoln Avenue, York, NE 68467 as a physical address. Both C-Tec and C-Mix utilize telephone numbers 402-362-5951 and 402-362-6462.

21. C-Tec ceased policy coverage on November 14, 2007, the same day C-Mix obtained coverage through the Nebraska Workers' Compensation Assigned Risk Pool. There is no other policy available to C-Tec for workers' compensation coverage.

22. The Governing Classification Code for C-Tec and C-Mix, 5213 Concrete Construction NOC, is the same.

23. Exhibit M attached to the Stipulation of Facts is a true and accurate copy of a letter on the letterhead of C-Tec responding to information requested of C-Mix.

24. Exhibit N attached to the Stipulation of Facts is a true and accurate copy of a C-Tec check dated November 9, 2007, made payable to Travelers for the amount of \$11,052.00 in payment for C-Mix's deposit premium.

25. Exhibit O attached to the Stipulation of Facts is a true and accurate copy of reports from the Nebraska Secretary of State in 1995 stating that Amy Wurst, spouse of C-Tec President Greg Wurst, was the secretary and treasurer for C-Tec.

26. Exhibit P attached to the Stipulation of Facts is a true and accurate copy of a report from the Secretary of State in 2006 for C-Mix. Both this report and the report for C-Tec in 1995 list Amy Wurst as the registered agent and give the same office address.

27. Exhibit Q attached to the Stipulation of Facts is a true and accurate copy of Rule 3-F-1 of the Experience Rating Plan Manual, 2003 edition.

28. Exhibit R attached to the Stipulation of Facts is a true and accurate copy of a letter dated January 23, 2008, stating C-Tec's current experience modification factor is a 1.25 with a 1.35 ARAP.

29. Exhibit S attached to the Stipulation of Facts is a true and accurate copy of a letter sent December 4, 2007, to C-Mix regarding Nebraska Workers' Compensation policies.

30. Exhibit T attached to the Stipulation of Facts is a true and accurate copy of a letter sent on December 21, 2007, in response to Travelers request for information from C-Mix sent on C-Tec letterhead by Amy Wurst.

III. DISCUSSION

The question presented by this appeal is whether NCCI's determination that C-Mix and C-Tec are combinable for purposes of determining the appropriate experience rating modification factor to apply to C-Mix is supported by the evidence, utilizing the Plan, the Agreement, and the legislative history as legal guidance. As Appellant, C-Mix has the burden of proving that the Panel's decision of September 18, 2008, was erroneous and should be vacated and set aside by the Department.

Under the Agreement, it is stated that the rating systems and policy forms used by Travelers shall be those filed by the NCCI. The NCCI has issued an experience rating manual, together with a user's guide companion to the manual. Among the purposes stated therein is to individualize a risk's premium and to provide an incentive to maintain a safe workplace. By comparing the total experience of individual risks with the average risk in the same classification, an experience rating modification factor is developed which can result in an increase, decrease, or no change in premium.

The manual contains five rules. Rule 3 is determinative of this appeal and considers aspects of changes in ownership or combinability status. Further, as a catchall, Rule 3.F requires that the NCCI combine two entities so as to neutralize any action taken by an employer to evade an experience rating modification. The NCCI is required to combine two entities to neutralize such evasion, even if the particular requirement for combinability set forth in the earlier sections of Rule 3 are not met. The manual recognizes that some employers may take actions for the purpose of avoiding a modification, while others may take actions for legitimate business reasons that result in the improper action of a rating modification. It goes on to state that regardless of intent, any action that results in the miscalculation or misapplication of an experience rating modification determination in accordance with the Plan is prohibited. Included but not limited in such actions are a change of combinability status and transfer of operations from one entity to another entity that is not combinable according to Rule 3.D. In such circumstances, the rating organization is authorized to obtain any information that indicates evasion or improper calculation. Finally, the manual authorizes the rating organization to ensure the proper calculation and application of all current and preceding experience rating modifications including, but not limited to, the issuance of experience rating modifications. Under Rule 4, any such change is applied retroactively to the date of the change.

C-Mix has failed to prove that its sole business activity was not to provide leased workers and services to C-Tec, its single client. It has also failed to prove that Greg and Amy Wurst did not establish C-Mix as a new business in an effort to secure a 1.0 experience modifier that would allow C-Mix to bid on certain jobs. C-Mix has further failed to prove that it has not assumed the former operations of C-Tec by providing workers solely to C-Tec, by operating from the same location, by

performing the same type of work, and by sharing common management. Stipulated facts in paragraphs 19 – 23 prove the contrary.

On July 16, 2009, Travelers submitted a Supplement Memorandum objecting to C-Mix's raising a new issue in its final brief that the current experience modifier is unfair because it will remain elevated until November 2009, because the renewal date of the C-Mix policy is six months later than the renewal date of the former C-Tec policy. This argument in turn is dependent upon the Affidavit of Jeffrey Pray of Sioux Falls, South Dakota. Travelers contends, among other things, that since Pray's Affidavit is outside the Joint Stipulation of Facts submitted and received into the record, that it should not be considered by the Department. The hearing officer concurs. The Affidavit and the argument regarding the unfairness of the current experience modifier has not been considered.

NCCI filed a brief arguing that it is not a party to this appeal, having previously objected to certain interrogatories, requests for production, and requests for admissions from C-Mix. Such objections were based on NCCI's contention that it is not a proper party to this appeal. NCCI's position is consistent with the Department's previous position in all recent similar workers' compensation assigned risk appeals. However, NCCI's objection to discovery has been rendered moot by the stipulation of facts, and need not be ruled upon.

For all of the above reasons, it is recommended to the Director that C-Mix has failed to sustain its burden of proving that NCCI's ruling of March 10, 2008, that C-Mix and C-Tec should be treated as one entity for the purpose of determining C-Mix's experience rating modifier, is incorrect. Although Travelers does not have the burden of proof, a preponderance of the evidence does sustain a finding and conclusion that the record in this proceeding and the applicable rules require that C-Mix and C-Tec should be treated as one entity for the purpose of determining C-Mix's experience rating modifier and that, accordingly, NCCI's ruling of March 10,

2008, and the subsequent affirmation by the NCCI on May 5, 2008, and by the Panel on September 18, 2008, should be ratified, affirmed and approved, and that C-Mix's appeal should be denied and dismissed.

IV. CONCLUSIONS OF LAW

1. The Department of Insurance of the State of Nebraska has jurisdiction of this appeal, and all proceedings have been conducted in accordance with applicable constitutional, statutory, and regulatory requirements.

2. The Stipulations of Facts and all exhibits attached thereto entered into by the parties are received in evidence and are a part of the Department's record in this proceeding.

3. As Appellant, C-Mix, LLC, has failed to sustain its burden of proving that NCCI's ruling on March 10, 2008, and subsequently affirmed on September 18, 2008, that C-Mix and C-Tec should be treated as one entity for the purpose of determining C-Mix's experience rating modifier is incorrect.

4. A preponderance of the evidence proves that NCCI's ruling of March 10, 2008 and subsequent affirmation by the Panel on September 18, 2008, from which this appeal was made, that C-Mix and C-Tec should be treated as one entity for the purpose of determining C-Mix's experience rating modifier is correct and should be affirmed, and that C-Mix's appeal herein should be denied and dismissed.

VI. RECOMMENDED ORDER

It is therefore recommended that the ruling of NCCI on September 18, 2008, that C-Mix and C-Tec should be treated as one entity for the purpose of determining C-Mix's experience rating modifier is correct and substantiated by the record herein, and should be in all respects ratified, affirmed and approved.

It is further recommended that the appeal of C-Mix filed before the Department on October 17, 2008, appealing the NCCI Panel's decision of September 18, 2008, be denied and dismissed.

Dated this 31st day of August, 2009.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE



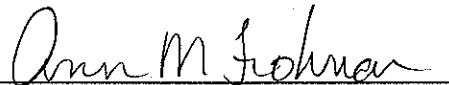
SAMUEL VAN PELT
HEARING OFFICER for the
Department of Insurance,
State of Nebraska

ORDER

I hereby certify that the foregoing Recommended Order is adopted as the Order of the Nebraska Department of Insurance in Re Workers' Compensation Appeal of C-Mix, LLC, Cause No.: I-80.

Dated this 31st day of August, 2009.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE



ANN M. FROHMAN
Director of Insurance

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings of Fact, Discussion, Conclusions of Law, Recommended Order and Order issued in Cause No.: I-80 was served upon the parties by mailing a copy to the individuals listed below, via regular US mail, postage prepaid, on this 31st day of August, 2009.

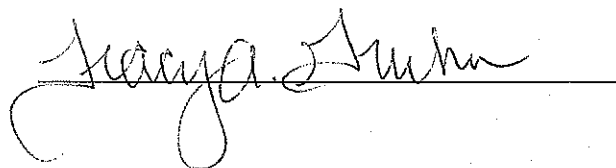
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A handwritten signature in cursive script, appearing to read "Gary Russo", is written over a horizontal line.