IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
Case Nos. 1D16-5408 and 1D16-5416

NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., THE OFFICE OF INSURANCE REGULATION, and COMMISSIONER DAVID ALTMAIER, in his official capacity,

Appellants,

vs.

JAMES F. FEE, JR., individually,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT, NATIONAL COUNCIL ON COMPENSATION INSURANCE

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STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court final judgment determining that Appellants, National Council on Compensation Insurance, Inc. ("NCCI"), and the Florida Office of Insurance Regulation ("OIR"), violated Florida's Sunshine Law, and that NCCI violated Florida's Public Records Law, as well as portions of the Florida Insurance Code. On those bases, the trial court enjoined the OIR's October 5, 2016, Final Order approving NCCI's rate filing and a 14.5% workers' compensation rate increase effective December 1, 2016. NCCI appeals the final judgment because it is not supported by competent substantial evidence, contradicts both the plain language and the intent of Florida Statutes, and is contrary to binding precedent.

I. Florida Workers' Compensation Law

NCCI is a private corporation that is registered to do business in Florida and also operates in more than 40 other states. NCCI is licensed as a rating organization pursuant to section 627.221, Florida Statutes. R. 453. In that capacity, NCCI makes insurance rate filings in Florida on behalf of workers' compensation insurance companies. *Id.*

Section 627.091 requires workers' compensation insurers to file with the OIR "every manual of classifications, rules, and rates, every rating plan, and every modification of any of the foregoing which it proposes to use." § 627.091(1), Fla.

Stat. Alternatively, Florida law permits an insurer to satisfy its statutory rate filing obligation by becoming a member of, or subscriber to, a licensed rating organization, which makes such filings on behalf of the subscribing insurer. § 627.091(4), Fla. Stat. Most workers' compensation insurers in Florida subscribe to NCCI to make workers' compensation rate filings on their behalf, in lieu of making their own filings. NCCI does not act on behalf of, or in place of, the OIR in making these rate filings.

Once an individual insurer or licensed rating organization makes a rate filing, the OIR reviews the filing for compliance with statutory requirements, and is charged with ensuring that rates are not "excessive, inadequate, or unfairly discriminatory…" § 627.031(2), Fla. Stat. After review, the OIR approves or disapproves the filing.

Separate from its role as a licensed rating organization in Florida, NCCI contracted with the OIR to act as its statistical agent as contemplated by section 627.331(3), Florida Statutes. Pl. Ex. 27.[1] In that capacity, NCCI compiles data regarding the loss, expense, and claims experience of Florida workers' compensation insurance carriers. NCCI's gathering and dissemination to the OIR of data under its statistical agent contract is separate and distinct from the rate

[1] The Index to the Record does not assign page numbers to exhibits.

filing activities NCCI performs on behalf of its subscribing insurers as a licensed rating organization. While NCCI acts on the OIR's behalf when NCCI gathers data as a statistical agent, it acts solely on behalf of private insurers when it makes rate filings with the OIR. § 627.091(4), Fla. Stat.

II. The 2016 Rate Filings

On May 27, 2016, NCCI, on behalf of its subscribing insurers, submitted a rate filing to the OIR proposing an increase of 17.1% in the overall statewide workers' compensation insurance rate level effective August 1, 2016 (the "Initial Rate Filing"). Joint Ex. 1. The proposed rate increase resulted from the April 28, 2016 decision in *Castellanos v. Next Door Co., et al.*, 192 So. 3d 431 (Fla. 2016), declaring unconstitutional the statutory cap on workers' compensation claimant attorneys' fees, together with changes to the Florida Workers' Compensation Health Care Provider Reimbursement Manual. *Id.*

On June 9, 2016, the Florida Supreme Court issued its decision in *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016), declaring unconstitutional the 104-week statutory limitation on temporary total disability benefits and reinstating a 260-week limitation on those benefits. Because of the *Westphal* decision, on June 30, 2016, NCCI amended its Initial Rate Filing to propose an additional 2.2% rate increase, for a total proposed rate increase of 19.6% effective October 1, 2016 (the "Amended Rate Filing"). Joint Ex. 2.

III. Sunshine Law Requirements Applicable to Committees of Rating Organizations

Section 627.091(6), Florida Statutes, applies Florida's Sunshine Law to recognized rating organizations in a limited context, specifying that whenever a "committee of a recognized rating organization with responsibility for workers' compensation and employers' liability insurance rates" meets to discuss certain topics identified in the statute, such meeting must be conducted pursuant to the requirements of the Sunshine Law.

Prior to 1991, NCCI had a committee with responsibility for Florida workers' compensation insurance rates, as well as similar rates committees in the other states where it operated. T. 143-44; Pl. Ex. 16 at 4-6, App. 49. The members of these committees were representatives of workers' compensation insurers writing policies in those states, and such members voted on, and approved as a committee, rates to be filed with the Department of Insurance ("DOI").[2] *Id*. Representatives of the DOI were provided notice of, and attended, such committee meetings. App. ex. 2.[3] Due to antitrust concerns, NCCI disbanded the Florida rates committee in 1991, along with the rates committees in other states, and

[2] The Department of Insurance was the predecessor to the OIR.

[3] The appendix to this brief includes the deposition of NCCI corporate representative Lori Lovgren. Ms. Lovgren's deposition was admitted as evidence in the proceeding below. T. 163-64. It was not included in the record on appeal and an unopposed motion to supplement the record was filed on January 6, 2017.

provided notice to state regulators, including the OIR, that such committees were being disbanded. T. 143-44; Pl. Ex. 16 at 5. NCCI has not re-formed or recreated these committees. *Id.*

Undisputed record evidence demonstrates that NCCI does not now, and did not at any time relevant to this proceeding, have a committee with responsibility for Florida workers' compensation insurance rates. T. 144, 190-91; Pl. Ex. 16 at 5. Instead, NCCI's 2016 Florida workers' compensation rate filings, which are the subject of this appeal, were prepared at the direction of, and approved for filing with the OIR by, Mr. Jay Rosen, NCCI's lead actuary for Florida. T. 136, 147-52; App. 33-34, 79.

Mr. Rosen was the NCCI employee with decision-making authority for the Initial and Amended Rate Filings. App. 33-37, 79. With the assistance of his staff, Mr. Rosen reviewed and analyzed data related to each of these filings and selected the proposed rates. App. 33-35. As part of this process, Mr. Rosen met with NCCI staff and had "Technical Peer Review" (TPR) meetings and "Phase II review" (Phase II) meetings to discuss the Initial and Amended Rate Filings. T. 119-20, 128-31. App. 51-52.

After Mr. Rosen determined the rate to be filed with the OIR, he presented his proposed rate at the TPR meeting. T. 119-21. The purpose of the TPR meetings was to peer review the proposed rate filings and prepare Mr. Rosen for

the OIR public rate hearing. T. 119-20. Attendees at the TPR meetings included NCCI actuaries whose general day-to-day responsibilities include the review and determination of rates in states other than Florida. T. 121. NCCI actuaries at the meeting reviewed the rate proposal, asked questions and provided comments, but had no authority to change Mr. Rosen's determinations. *Id*. No OIR representative attended or participated in the TPR meetings. T. 121.

The Phase II meeting had a similar purpose. T. 122. Mr. Rosen presented his rate proposal to a smaller group of NCCI actuaries as well as members of NCCI's government affairs staff, who questioned him about the proposed rate and the assumptions supporting it. T. 122-24. Among other things, the Phase II meeting enabled NCCI's government affairs staff to understand NCCI's rate filing so they could explain it to the OIR, legislators, and other interested parties. T. 122. As with the TPR meeting participants, the Phase II meeting attendees had no authority to change Mr. Rosen's determinations and did not make any changes. T. 129. No OIR representative attended the Phase II meeting. T. 122-25.

On August 2, 2016, Appellee requested from NCCI, pursuant to section 627.291(1), Florida Statutes, "all pertinent information relating to all NCCI rate and rule filings affecting Florida Workers' Compensation premiums that were in effect for the calendar years 2006 through 2016." Pl. Ex. 1. NCCI responded to Appellee's request and provided him with copies of the Initial and Amended Rate

Filings, and additional documents related to the rate filings. Pl. Ex. 1-9. Additionally, the entirety of NCCI's rate filings were available for review at the OIR, and were in fact reviewed at the OIR by Appellee's representative. T. 74-75.

On July 1, 2016, the OIR sent NCCI a Notice of Hearing stating that a public hearing would be held on the Amended Rate Filing on August 16, 2016. Joint Ex. 3. On July 7, 2016, the OIR published a Notice of Hearing in the Florida Administrative Register for a public hearing on August 16, 2016, to hear public comment and testimony on the Amended Rate Filing. Joint Ex. 4.

Prior to the public hearing, the OIR posted on its public website hundreds of pages of documents that NCCI relied on for its Amended Rate Filing. T. 182-85, 196-97. Such information included the rate filings and all information provided by NCCI to the OIR as support for such rate filings. *Id.* As of August 2, 2016, at the latest, two weeks before the public hearing and well before the filing of Appellee's lawsuit, members of the public, including Appellee and Appellee's actuary, thus had access to all information NCCI provided to the OIR in support of its rate filings. Additionally, all of NCCI's Florida rate filings for the ten other years (2006 through 2015) that Appellee requested were made publicly available by the OIR on its website on or before August 2, 2016. T. 182-83. This posting included *all* of the documents the OIR reviewed in evaluating these filings. T. 184, 196-97.

The public hearing on the Amended Rate Filing was held on August 16, 2016, in Tallahassee, Florida, and lasted roughly four-and-a-half hours. Joint Ex. 6. The entire hearing was open to the public, which was given substantial opportunity to present comments and testimony and did so. The OIR elicited testimony about the Amended Rate Filing from NCCI representatives, and questioned them about the filing. *Id.* The OIR also heard testimony from numerous other interested parties, including Mr. Stephen Alexander, an actuary retained by Appellee to present testimony at the public hearing on Appellee's behalf. *Id.* Mr. Alexander also filed written comments with the OIR on Appellee's behalf. Def. Ex. 9.

The OIR's process allowed for significant public participation during the hearing, as well as before and after. The OIR received substantial input from interested stakeholders and the public, including persons in favor of, and opposed to, NCCI's filing. Additionally, the Insurance Consumer Advocate, charged by section 627.0613, Florida Statutes, with representing the interests of the general public before the OIR, attended the public hearing. Joint Ex. 6 at 6. Pursuant to section 627.0613(2), the Insurance Consumer Advocate has access to all files, records, and data of the OIR. The OIR held open the time for submitting additional written public comments for one week after the public hearing, through August 23, 2016. Joint Ex. 6 at 4.

After reviewing the information provided, including all public comments and testimony (T. 184-85), and performing substantial analysis over a period of almost a month and a half, on September 27, 2016, the OIR issued an Order disapproving the Amended Rate Filing. Joint Ex. 8. The OIR's Order rejected NCCI's request for a 19.6% statewide overall rate level change but stated that a 14.5% rate change would be approved, provided other conditions detailed in the Order were complied with. Joint Ex. 8 at 7. The Order also included a standard Notice of Rights describing the administrative procedures available for challenging the Order. Joint Ex. 8 at 10.

On October 4, 2016, NCCI submitted a Revised Rate Filing to the OIR proposing a 14.5% overall increase in the workers' compensation insurance rates. NCCI Ex. 7. The Revised Rate Filing was approved via a final order issued October 5, 2016, effective December 1, 2016 (the "OIR's Final Order"). Joint Ex. 9. The OIR's Final Order recognized that rates in effect prior to December 1, 2016, were inadequate because of the *Castellanos* and *Westphal* decisions, as well as the legislative changes during the 2016 legislative session, and that rates would remain inadequate if the OIR's Final Order was not given effect. *Id.* The OIR's Final Order also included a notice of appeal rights. *Id.* at 1-2. No challenges to the OIR's Final Order were filed.

IV. **Appellee's Complaint and the Trial Court's Ruling**

Appellee, the principal of a law firm that represents primarily workers' compensation claimants (T. 72-73), filed a four-count complaint alleging that: (1) NCCI violated the provisions of section 627.091(6), Florida Statutes, (2) NCCI and the OIR violated section 286.011, Florida Statutes, Florida's Sunshine Law, (3) NCCI violated the provisions of section 627.291(1), Florida Statutes, and (4) NCCI violated chapter 119, Florida Statutes, Florida's public records law. R. 6-44. In essence, Appellee's Complaint was a collateral attack on Florida's workers' compensation rate making process and the OIR's Final Order.

After denying motions to dismiss filed by both NCCI and the OIR (R. 391-93), the trial court held an expedited evidentiary hearing on November 23, 2016. Following the submission of proposed orders by the parties, the trial court issued a 73-page Order determining that both NCCI and the OIR violated Florida's Sunshine Law, and that NCCI violated Florida's Public Records Law, as well as sections 627.091(6) and 627.291(1) relating to public meetings and providing certain records to insureds. R. 476-548.

Based on such rulings, the trial court also declared void *ab initio* the OIR's Final Order approving NCCI's rate filing increasing workers' compensation insurance rates by 14.5% effective December 1, 2016. R. 545-46. NCCI and the OIR filed timely appeals of the trial court's Order. R. 549-699. This Court stayed the trial court's Order until resolution of this appeal.

SUMMARY OF ARGUMENT

The trial court's Order is flawed in numerous respects, fails to follow decades of binding precedent, ignores the plain language of relevant Florida statutes, and makes factual findings that lack record support and are directly contrary to the uncontradicted evidence. Most notably, the Order applies the incorrect law to two of the legal issues central to the resolution of this case: (1) when Florida's Sunshine Law applies to private corporations licensed as Florida rating organizations; and (2) the extent to which Florida's Public Records Law applies to documents and records maintained by such private corporations. Application of the correct law, as well as facts supported by competent substantial evidence, requires reversal of the trial court's Order in its entirety.

First, the trial court's determination that NCCI violated section 627.091(6) is based on a flawed reading of the statute. The statute extends application of Sunshine Law requirements only to rating organization committees with responsibility for Florida workers' compensation rates. Uncontroverted record evidence demonstrates that NCCI does not have a committee with responsibility for Florida workers' compensation rates, that no NCCI committee had input in NCCI's rate filings, and that instead responsibility for NCCI's Florida rate filings is vested in NCCI's lead actuary for Florida. The trial court failed to apply the plain language of the statute and ruled that all discussions of NCCI staff which

pertain to Florida workers' compensation rates must be conducted in a public hearing. This ruling is unsupported by statutory language, is contrary to case law interpreting Florida's Sunshine Law, and is untenable.

Second, the trial court's determination that section 286.011 applies directly to NCCI is contrary to applicable law. Florida's Sunshine Law applies only to boards or commissions of governmental entities. NCCI is a private corporation, not a governmental entity, and no governmental entity has delegated the performance of its public, rate approval purpose to NCCI.

Third, although the trial court determined that NCCI is subject to chapter 119 when it performs activities as a rating organization, the trial court admittedly failed to apply the totality of factors test established by the Florida Supreme Court for such purposes. When the appropriate test is applied, it is evident that chapter 119 does not apply to NCCI in the rate filing context. Likewise, no chapter 119 violation could have occurred, as Appellee failed to make a public records request in compliance with section 119.0701(3)(a), Florida Statutes.

Fourth, for numerous reasons, no violation of section 627.291(1) occurred. Appellee was never "affected" by any rate for which he sought relevant information because none of the rate filings at issue were in effect when he made his request; the rate filings that were the subject of his request were disapproved by the OIR. Accordingly Appellee's request did not comply with section 627.291(1).

Nevertheless, prior to filing of his lawsuit, Appellee was provided all information he could possibly have been entitled to regarding such rate filings. The trial court's ruling that NCCI violated section 627.291(1), and that the statute entitles Appellee to NCCI internal documents which were not part of its rate filings, contradicts the plain language of the statute.

In sum, each of the trial court's determinations is based on flawed legal reasoning, and findings of fact which are not supported by competent substantial evidence. If allowed to stand, the trial court's Order will mark a dramatic expansion of the requirements of Florida's Sunshine and Public Records Laws, as well as an expansion of sections 627.091(6) and 627.291(1) beyond their plain language, in violation of clear binding precedent. Any such expansion would greatly inhibit the ability of private entities, as well as government entities, to conduct business in Florida.

STANDARD OF REVIEW

Trial court orders finding Sunshine Law violations are subject to *de novo* review. *See Bruckner v. City of Dania Beach*, 823 So. 2d 167, 169 (Fla. 4th DCA 2002) ("Cases involving alleged violations of the Sunshine Law are determined on a case by case analysis basis. Review of these types of cases by courts of appeal are made pursuant to a *de novo* standard."). The ultimate question of whether a prohibited meeting of a body subject to the Sunshine Law has occurred is a

question of law that is to be reviewed *de novo*. *See McDougall v. Culver*, 3 So. 3d 391, 392 (Fla. 2d DCA 2009).

Questions of statutory interpretation are likewise reviewed *de novo*. *Lombardi v. Southern Wine & Spirits*, 890 So. 2d 1128, 1129 (Fla. 1st DCA 2004) ("The question presented is one of statutory interpretation. Thus, we apply the de novo standard of review."). Trial court findings of fact are reviewed to determine if they are supported by competent, substantial evidence. *Mastzal v. City of Miami*, 971 So. 2d 803, 808 (Fla. 3d DCA 2007) ("We must review the trial court's findings of fact in this bench trial to determine if they are supported by competent, substantial evidence.").

ARGUMENT

I. The Trial Court's Ruling that NCCI Violated Section 627.091(6) is Incorrect as a Matter of Law and Fact.[4]

Florida's Sunshine Law applies to NCCI, and other rating organizations, only to the extent it is made applicable to such private companies through section 627.091(6). Section 627.091(6) is a narrowly tailored statute requiring that rating organization committees responsible for making determinations regarding Florida workers' compensation rates meet in public when discussing certain topics.

[4] For the sake of brevity, this brief addresses only those erroneous factual findings that are material to the issues presented in this brief.

Section 627.091(6), provides:

> 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 [OIR] and shall provide at least 14 days' prior notice of such meetings to the public by publication in the Florida Administrative Register.

§ 627.091(6), Fla. Stat. The provisions of section 286.011, Florida Statutes, are therefore extended to NCCI *only if* NCCI has a "committee with responsibility for workers' compensation and employer's liability insurance rates," *and only when* such committee meets in Florida 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 other matters pertaining specifically and directly to such Florida rates." § 627.091(6), Fla. Stat. That did not happen here. Record evidence demonstrates that NCCI does not have a committee with responsibility for workers' compensation insurance rates in Florida (or elsewhere), and has not had such a committee for the past 25 years. While NCCI had such committees in the distant past (made up of insurer representatives with collective authority to determine NCCI rate filings), NCCI disbanded these committees in Florida, and nationwide, because of concerns about their potential antitrust implications.

Record evidence unequivocally establishes that once NCCI disbanded this former Florida rates committee, over two decades ago, no new committee was created to take its place. Instead, NCCI's lead actuary for Florida became responsible for rate filings in Florida.

Because no NCCI committee within the meaning of section 627.091(6) exists, no such committee met to perform the functions noted in that statute with respect to the 2016 rate filings. The trial court's determination to the contrary misinterprets the plain language of section 627.091(6), as well as binding Florida precedent, and is not supported by competent substantial evidence. Instead, the trial evidence demonstrates unequivocally that Mr. Jay Rosen, NCCI's lead actuary for Florida, had responsibility and decision-making authority for NCCI's Florida workers' compensation insurance rate filings.

A. The Trial Court Ignored the Plain Language of Section 627.091(6) and Adopted an Unsupportable Interpretation.

Florida courts have repeatedly emphasized that, "to determine the meaning of a statute," a court should "first look to its plain language." *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So. 2d 1204, 1208 (Fla. 2006). "When the statute is clear and unambiguous, 'there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1082 (Fla. 2009); *see also Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (same). A

"court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *American Bankers Life Assurance Co. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).

The trial court erred by violating these principles of statutory interpretation. Its Order ignores the plain language of section 627.091(6) by stating 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 (emphasis added).

This ruling cannot be squared with the express language of section 627.091(6) noted above, which extends the requirements of section 286.011 only to committees "with responsibility for workers' compensation and employers' liability insurance rates in this state," and only when such committees meet "to discuss the necessity for, or a request for, Florida rate increases or decreases, the determination of Florida rates, the rates to be requested, or any other matters pertaining specifically and directly to such Florida rates." The trial court's reading of the statute thus ignores the above limiting phrase and impermissibly expands the scope of the statute far beyond the requirements set forth in the plain statutory language by ruling that regardless of whether a committee within the meaning of the statute exists, let alone meets, the statute requires a rating organization to

conduct all rate filing activities (even those taken by a single decision-maker) in public meetings pursuant to section 286.011.[5]

B. NCCI Does Not Have a "Committee" Within the Meaning of Section 627.091(6)

The term "committee" is not further defined in section 627.091(6), but as the provision relates to Florida's Sunshine Law, basic Sunshine Law principles should be applied in interpreting the term. Application of such principles makes clear that no "committee" exists unless the purported "committee" possesses collective decision-making authority. In the Sunshine Law context generally, it is well-settled that meetings of groups of individuals without collective decision-making authority, even within governmental agencies, are not subject to Sunshine Law requirements. *See, e.g., Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 1985); *Finch v. Seminole Cnty. School Bd.*, 995 So. 2d 1068 (Fla. 5th DCA 2008); *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000).

[5] Any assertion that rating organizations are required to create committees to discuss workers' compensation rate matters is meritless. Where the legislature intends to create committees or other collegial bodies and provide such bodies with authority, it expressly does so and provides direction regarding the makeup of such body. *See, e.g.*, § 627.311(5)(a), Fla. Stat. (creating Board of Governors of Florida Workers' Compensation Joint Underwriting Association and describing makeup and authority of such board); § 20.155, Fla. Stat. (creating Board of Governors of State University System and describing makeup and authority of such board); § 26.55, Fla. Stat. (creating Conference of Circuit Judges of Florida and describing makeup and authority of such conference); § 420.504, Fla. Stat. (establishing board of directors of Florida Housing Finance Corporation and describing makeup and authority of such board).

Florida's Sunshine Law generally applies to "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, Fla. Stat. The statute thus applies to public collegial bodies within this state, at the local and state levels. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971). The touchstone for application of the law, however, remains the collegial nature of the body. Single individuals who possess decision-making authority are not subject to open meetings requirements, even when such individuals meet with staff.

The "dispositive question" in determining whether the Sunshine Law applies is whether a committee has been delegated "decision-making authority," as opposed to mere "information-gathering or fact-finding authority." *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010). "Where the committee has been delegated decision-making authority, the committee's meetings must be open to public scrutiny, regardless of the review procedures eventually used by the traditional governmental body." *Id*. Conversely, where no decision-making authority exists, the Sunshine Law is inapplicable. Section 627.091(6) itself draws this distinction as well, as it expressly applies only to committees "with responsibility for workers' compensation and employer's liability insurance rates in this state."

The trial court's determination that any meeting of a "group of people," including NCCI staff, in which a rate filing is discussed constitutes a meeting of a committee, regardless of whether the group has decision-making authority, is inconsistent with well-settled precedent interpreting the Sunshine Law, as well as the plain language of section 627.091(6). R. 538. A group of staff who lack the collective authority to decide *anything* plainly could not be considered "responsible for" rates in Florida. Such a conclusion would make the Sunshine Law more broadly applicable to NCCI, a private corporation, than it is to even Florida governmental agencies.

As Florida courts have repeatedly held, the Sunshine Law does not apply to meetings of staff that are responsible for advising and informing a decision-maker through fact-finding consultations. S*ee, e.g.*, *Baker v. Dep't of Ag. And Consumer Serv.*, 937 So. 2d 1161 (Fla. 4th DCA 2006) (no violation of Sunshine Law when agency employees investigated a licensee's alleged failure to follow state law, and an assistant director made the decision to file a complaint as "[c]ommunication among administrative staff in fulfilling investigatory, advisory, or charging functions does not constitute a 'Sunshine' Law violation."); *Knox v. Dist. Sch. Bd. of Brevard*, 821 So. 2d 311, 315 (Fla. 5th DCA 2002) (Sunshine Law did not apply to a group of school board employees meeting with an area superintendent to review applications, which were then sent by the area superintendent to the school

superintendent with her recommendation: "a Sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties."); *Lyon*, 765 So. 2d 785 (Sunshine Law does not apply to informal meetings of staff where discussions were "merely informational," none of the individuals attending the meetings had decision-making authority during the meetings, and no formal action was taken or could have been taken at the meetings); *Molina v. City of Miami*, 837 So. 2d 462, 463 (Fla. 3d DCA 2002) (committee not subject to Sunshine Law because it was "nothing more than a meeting of staff members who serve in a fact-finding advisory capacity to the chief "); *J.I. v. Dep't of Children and Families*, 922 So. 2d 405 (Fla. 4th DCA 2006) (Sunshine Law not applicable to Department of Children and Families permanency staffing meetings conducted to determine whether to file a petition to terminate parental rights); *Bennett v. Warden*, 333 So. 2d 97 (Fla. 2d DCA 1976) (meetings of committee appointed by public college president to report on employee working conditions not subject to Sunshine Law).

Likewise, the presence of a single decision-maker at meetings of staff does not subject such meetings to the Sunshine Law. *See, e.g., Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 1985) (meetings between single decision-maker and members of staff not subject to the Sunshine Law). Instead, meetings of staff are subject to the Sunshine Law only when a committee of staff, as a

collegial body, has been delegated decision-making authority as opposed to conducting mere fact-finding or information-gathering. *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983); *see also, e.g.*, *Occidental Chemical Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977), disapproved in part on other grounds, *Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992); *Sch. Bd. of Duval Cnty. v. Fla. Publishing Co.*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996); Op. Att'y Gen. Fla. 89-39 (1989).

More fundamentally, even in the governmental context, meetings are required to be open to the public only when "official acts are to be taken." § 286.011(1), Fla. Stat. A group of employees who collectively lack the power to take *any* act cannot take official acts. Thus, a discussion among such employees cannot be a meeting "at which official acts are to be taken" and give rise to a Sunshine Law violation. The same is true here: where a group of NCCI employees *do not* have "responsibility for workers' compensation and employer's liability insurance rates in this state," that group cannot, and did not, take any act to create a rate increase or decrease in Florida. By the express terms of section 627.091(6) and basic Sunshine Law principles, Mr. Rosen's meetings with NCCI staff were not subject to the Sunshine Law's mandates.

If the conclusion reached by the trial court were applied to governmental agencies, no agency head could ever speak with an agency employee regarding agency business outside of a noticed public meeting because any meeting between

a decision-maker and any other agency person to discuss agency business would constitute a meeting of a *de facto* committee subject to the Sunshine Law. Such an absurd result would make the conduct of government business virtually impossible. The trial court's conclusion is equally untenable in the rate making context: if the Legislature intended the extraordinarily broad meaning adopted by the trial court, it easily could have written section 627.091(6) to state that any discussion among employees of a rating organization pertaining to rates in Florida must be conducted in a public meeting. It did not, and instead limited the application of section 627.091(6) to committees – collegial bodies – with decision-making responsibility for workers compensation insurance rates.

The evidence presented here is unequivocal. The determinations contemplated by section 627.091(6) were made by NCCI's lead actuary for Florida (Jay Rosen), not a committee. Although Mr. Rosen was assisted by staff, and several meetings of NCCI actuaries and employees occurred at which the rate filings were discussed, those internal meetings did not involve any collegial bodies with decision-making authority, and attendees at such meetings did not exercise any such authority. Attendees at those meetings did not decide and did not have authority to decide, whether a rate increase was needed and what rate was proper, or to mandate any change to the rate Mr. Rosen had decided upon. Such meetings,

as a matter of law, are not meetings of a "committee" as that term is utilized in section 627.091(6).

C. The Trial Court's Ruling that a Committee Delegated Authority to a Single Individual is not Supported by Evidence.

The trial court also erred in suggesting that Mr. Rosen, individually, was subject to the Sunshine Law because he was delegated authority by an NCCI committee subject to the requirements of section 627.091(6). *See* R. 531-32. Record evidence unequivocally demonstrates that no NCCI committee with responsibility for Florida workers' compensation rates exists, and therefore no delegation of authority from such a committee could have occurred. While the trial court's Order suggests that NCCI changed "the configuration of its 'committee'" structure to delegate authority to Mr. Rosen and avoid the application of the Sunshine Law," this finding is not supported by record evidence. *See* R. 531. Instead, the uncontroverted record evidence demonstrates that NCCI disbanded its rates committees nationwide in 1991 due to antitrust concerns after notifying state regulators (including the predecessor to the OIR), and at that time such committees ceased to exist and responsibility for making decisions about Florida rate-filings was assigned by NCCI to the Florida lead actuary. T. 143-44. NCCI as a corporation does not itself constitute a committee, and its assignment of the function of preparing and making decisions about Florida rate filings to Mr.

Rosen does not constitute a delegation of authority by a committee with responsibility for Florida workers' compensation rates.[6]

Likewise, the existence of NCCI committees that do not have responsibility for Florida workers' compensation rates is irrelevant and does not provide any support for the trial court's findings. In September 2014, Cyndi Cooper, an actuary for the OIR, notified NCCI that certain meetings of NCCI's Underwriting Committee *may* involve discussions of matters pertaining to Florida rates, which, if true, would subject such meetings to the public notice requirements set out in section 627.091(6). Pl. Ex. 13. NCCI responded to the letter through counsel and explained that NCCI's Underwriting Committee does not discuss matters pertaining to Florida rates. Pl. Ex. 16. In fact, the NCCI Board resolution which established the Underwriting Committee expressly states "Rate or loss cost filings will not be discussed by this Committee." *Id.* at 1-2. While not mentioned in the trial court's Order, the undisputed evidence presented to the trial court demonstrates that, after an investigation by the OIR and consideration of

[6] Also contrary to binding precedent is the trial court's determination that the "decision-maker" here is NCCI, and thus any meeting of NCCI staff with the OIR violated the Sunshine Law. *See* R. 533. The relevant inquiry is not whether an organization as a whole has decision-making authority (in which case every act by any employee of a government entity would be required to be taken in a public meeting), but instead whether a collegial body within an organization has decision-making authority. *See* § 286.011, Fla. Stat.

information provided by NCCI, the OIR determined that NCCI's Underwriting Committee does not discuss Florida rate-related matters and NCCI *does not have a committee* that performs the functions contemplated by section 627.091(6). T. 190-91. No record evidence supports a contrary determination.

The OIR's determination, which pertains to the process by which a rating organization licensed and regulated by the OIR conducts its business, is entitled to deference because the OIR is charged with administering section 627.091. *See Farm Bureau Gen. Ins. Co. v. State*, 109 So. 3d 860, 861 (Fla. 1st DCA 2013) ("An agency's interpretation of a statute which it administers will be upheld unless it is clearly erroneous.") (internal citations omitted). Further, section 627.091(6) requires covered committees to provide notice of such meetings to the OIR, and the OIR can therefore determine whether section 627.091 has been complied with.

II. The Sunshine Law is not Directly Applicable to NCCI, and NCCI did not Violate the Sunshine Law.

A. The Sunshine Law does not Directly Apply to NCCI.

Section 286.011 makes the Sunshine Law generally applicable only to "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. Under *limited* circumstances, the Sunshine Law may apply to a private actor, but only when the government body that would otherwise be subject to the Sunshine Law delegates the performance of its public purpose to the private entity.

Mem. Hosp.-W. Volusia v. News-Journal Corp., 729 So. 2d 373, 382-83 (Fla. 1999); s*ee also* Fla. Att'y Gen Op. 2000-03 (characterizing *Memorial Hospital* as making the Sunshine Law applicable to a private entity when the entity is "standing in the shoes of the public agency").

Although the trial court's Order determines that NCCI is subject to the Sunshine Law when it prepares rate filings, the Order did not find that the OIR had delegated the performance of a public purpose to NCCI in the rate-filing context. Any determination by the trial court that the OIR delegated its public, rate approval/disapproval function to NCCI improperly applies the law to the facts and is based on a fundamental misunderstanding of the rate-making process and the laws governing it. In making rate filings on behalf of private insurers, NCCI does not act on behalf of the OIR. NCCI acts solely on behalf of private insurers. These facts are evident from a reading of the relevant statutes, and were admitted to by Appellee. T. 82-83.

As discussed above, workers' compensation insurers are required to file their rates with the OIR. § 627.091(1), Fla. Stat. Alternatively, insurers may adopt the rate filed with the OIR by a licensed rating organization to which they subscribe. § 627.091(4), Fla. Stat. When NCCI, or any other licensed rating organization, files for a rate which is adopted by an insurer, NCCI does not perform any function delegated by the OIR because the OIR does not have any public rate-filing

function. Instead, NCCI performs a function delegated to it by the private insurers that decide to utilize NCCI's rate filing. NCCI thus stands in the shoes of insurers, not the OIR, by making rate filings on behalf of insurers instead of insurers making their own rate filings. The insurers on whose behalf NCCI makes rate filings are not, and never have been, a "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. Accordingly, NCCI cannot become subject to the Sunshine Law by acting on behalf of private insurers.

Regardless of whether such rate filings are made by insurers or NCCI, the OIR's function remains the same – to review the filings made by NCCI, other rating organizations, and insurers, and determine whether those filings should be approved or disapproved. § 627.151(1), Fla. Stat. To be clear, Florida law does not provide to the OIR any authority to actually prepare or make any rate filings, but instead only to review such filings and approve or reject them. And the OIR has not delegated to NCCI or any other rating organization the OIR's statutory power and duty to review and approve or disapprove rate filings.

The trial court's Order also attempts to subject NCCI, a private actor, to the Sunshine Law by finding that NCCI acted at the direction of the OIR when it prepared the Revised Rate Filing in response to the OIR's September 27, 2016, order rejecting the Amended Rate Filing and providing that a 14.5% rate increase

would be approved. This conclusion is not supported by Florida law and again leads to absurd results. A rating organization or insurer cannot be deemed to be performing a public function and therefore subject to the Sunshine Law because it complies with guidance from a state regulator. If the OIR limited its responses to rate filings to a hard "yes" or "no," without providing any direction or guidance as to what rate it may approve, rating organizations and insurers would have to play a pointless game of ping pong, going back and forth with the OIR until the insurer or rating organization was able to pinpoint the precise rate the OIR determines to be appropriate. This would be grossly inefficient and increase costs to the state, insurance companies, and policyholders for no statutory or public policy purpose.

Moreover, the trial court's reasoning, if applied beyond this case, would subject essentially every regulated business operating in this state to the Sunshine Law. Myriad regulations direct regulated entities to take – or not take – various actions in the course of their businesses. That such actions may be "directed" by the government is irrelevant to whether the Sunshine Law is applicable: unless the private actor is acting in the stead of the government in carrying out the government's public function, the Sunshine Law does not apply.

When NCCI filed its Revised Rate Filing with the OIR, NCCI was still acting on behalf of Florida insurance carriers, not on behalf of the OIR, because

the OIR does not make rate filings. By doing so, NCCI was not acting on behalf of a governmental body and did not become subject to the Sunshine Law.

B. Section 627.093, Florida Statutes, Does Not Impose Sunshine Law Requirements on NCCI.

The trial court's Order declares that section 627.093, Florida Statutes, imposes Sunshine Law obligations on rating organizations. R. 483. However, this finding is not supported by the plain language of the statute.

Section 627.093 imposes Sunshine Law requirements *on the OIR, not private insurers or private rating organizations*. This is clear for at least two reasons. First, the text of section 627.093 makes section 286.011 applicable to certain actions only the OIR is empowered to take, such as the approval or disapproval of filings. NCCI has no power under Florida law to approve or disapprove rate filings.

Second, well-established principles of statutory construction further show that section 627.093 does not impose Sunshine Law obligations on NCCI. As the Florida Supreme Court has made clear, "[t]o ascertain the meaning of a specific statutory section, the section should be read in the context of its surrounding sections." *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 290 (Fla. 2003). Here, a review of section 627.093 in context demonstrates that it imposes Sunshine Law obligations *on the OIR, not on NCCI*: the statute is included in a series of statutory provisions governing the OIR's organization and operations, and is

directly preceded and followed by statutes creating entities within the OIR relating to worker's compensation insurance:

> **627.092 Workers' Compensation Administrator.—**
>
> There is created within the office [the OIR] the position of Workers' Compensation Administrator to monitor carrier practices in the field of workers' compensation.
>
> **627.093 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 from filing, or appeal from any of these regarding workers' compensation and employer's liability insurances.
>
> **627.096 Workers' Compensation Rating Bureau.**
>
> There is created within the office a Workers' Compensation Rating Bureau,[7] which shall make an investigation and study of all insurers authorized to issue workers' compensation and employer's liability coverage in this state. Such bureau shall study the data, statistics, schedules, or other information as it may deem necessary to assist and advise the office in its review of filings made by or on behalf of workers' compensation and employer's liability insurers.

Nothing in this series of statutory provisions regulates the conduct of a Florida rating organization or an insurance company making rate filings in Florida. As such, the statutory language, read in context, makes clear that section 627.093

[7] NCCI is neither the Workers' Compensation Administrator referenced in section 627.092 nor the Workers' Compensation Rating Bureau referenced in section 627.096.

imposes obligations on the OIR, not on private entities such as NCCI, and provides no support for the trial court's ruling.

C. Informational Discussions Between NCCI and the OIR Did Not Violate the Sunshine Law.

Substantial record evidence likewise demonstrates that, after NCCI made its rate filing, NCCI representatives and OIR employees informally discussed the filing. These discussions included an overview of the rate filings at the time of submission, requests from the OIR for additional information about the rate filings, and discussions about the logistics of the public hearing that the OIR held regarding the rate filings. Even though the trial court's Order did not identify any official act taken during these discussions, the Order declared that these informal discussions violated the Sunshine Law because they were not open to the public. The Order's findings in this regard are not supported by relevant evidence or applicable law.

There is no record evidence that any collegial body subject to the Sunshine Law was present at meetings between the OIR and NCCI, or that any official acts were taken at those meetings. The evidence instead showed only a limited exchange of information between various NCCI and OIR personnel at those meetings. As the language of section 286.011(1) makes clear, the Sunshine Law requires only that meetings of collegial bodies subject to the Sunshine Law, at which official acts will be taken, be held in the sunshine. The statute does not

require every meeting involving a government official to be held in the sunshine. As the everyday experience of government demonstrates, an agency is not limited to communicating with regulated entities only during noticed public meetings. Were that not the case, governmental agencies would be forced to schedule a public meeting each time an employee of a governmental agency asked a regulated entity for information or documents. Taken to its illogical absurdity, the trial court's view would require the OIR to notice a public meeting if it intended to meet with NCCI, or any other person or entity, to discuss when and where a public meeting would take place.

The trial court's Order appears to be based on the mistaken assumption that government bodies, when making decisions, are entitled to consider only information learned during public meetings, and that any other information is "tainted" and renders the decision void. No case law support is cited for this extraordinary proposition, nor does any exist. In fact, quite to the contrary, the body of Sunshine Law case-law is replete with cases holding that government staff may engage in fact-finding and information-gathering functions in private without violating the Sunshine Law. *See, e.g., Bennett*, 333 So. 2d 97; *Baker*, 937 So. 2d 1161; *Knox*, 821 So. 2d at 315; *Lyon*, 765 So. 2d 785; *Molina*, 837 So. 2d at 463; *J.I.*, 922 So. 2d 405.

If, as the trial court apparently believed, government and private regulated companies were forbidden from obtaining information from one another outside of public meetings, and that any attempt to do so created an incurable "taint" that rendered any subsequent actions void, a government agency would not be allowed to interact with private entities – or even itself – without violating the Sunshine Law. That is not the law in Florida.

D. Any Possible Sunshine Law Violation was Cured.

In addition to the fact that no Sunshine Law violation occurred, any possible Sunshine Law violation was clearly cured by the OIR's August 16th public hearing. The trial court's Order determining otherwise contradicts binding Florida Supreme Court precedent. Even assuming *arguendo* that NCCI had a committee with responsibility for Florida workers' compensation insurance rates (which it did not), and that such committee met to discuss the matters described in section 627.091(6) (which did not happen), any Sunshine Law violation arising therefrom was cured by the OIR's August 16, 2016 public hearing, which was publicly noticed and provided substantial opportunity for public input on the Amended Rate Filing.

It is well-settled that subsequent governmental action can cure a Sunshine Law violation. *See, e.g., Monroe Cnty. v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d DCA 1994); *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974). In *Pigeon Key*, the court held that "a full, open public

hearing by the public agency can correct the committee's Sunshine Law violations" if the subsequent hearing "is not merely a ceremonial acceptance" or "perfunctory ratification of secret decisions." *Pigeon Key*, 647 So. 2d at 860, 868 (citation omitted); *see also Tolar v. School Bd. of Liberty Cnty.*, 398 So. 2d 427, 429 (Fla. 1981) (holding that a full, open and independent public hearing of the disputed issue can remedy the earlier Sunshine Law violation); *Finch v. Seminole Cnty. School Bd.*, 995 So. 2d 1068, 1073 (Fla. 5th DCA 2008) (same).

The Court in *Pigeon Key* noted that, although an advisory committee conducted unnoticed meetings that violated the Sunshine Law, these violations were cured by subsequent public hearings conducted by a *separate government body* – a commission with oversight authority over the advisory committee that had to approve the committee's actions for them to take effect. *Pigeon Key*, 647 So. 2d at 860. In reaching this conclusion, the court emphasized that the subsequent hearings were "open public hearings" during which testimony from members of the community was presented on the issues raised during the unnoticed meetings, the commission "tabled its vote" to deliberate on an independent final decision, and ultimately rendered a final decision that was "markedly different" from that reached by the advisory committee.

Similarly, in *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 766 (Fla. 2010), the Florida Supreme Court recognized

that Sunshine Law violations may be cured through subsequent independent public action in the sunshine. The Court held that a "properly noticed public hearing" to approve action that may have been the subject of previous Sunshine Law violations, cured any possible prior Sunshine Law violations. The hearing at issue in *Sarasota Citizens* included "a multi-hour discussion" at which, as here, representatives of the plaintiff had the opportunity to speak – and in fact actually spoke. *See also Brucker v. City of Dania Beach*, 823 So. 2d 167, 171 (Fla. 4th DCA 2002) (subsequent meeting regarding same subject "held in the public, pursuant to duly published notices of commission meeting subject to comments by the public" cured Sunshine Law violation).

Conversely, Florida courts have held that a Sunshine Law violation is not cured by a subsequent public meeting when the meeting does not enable "the public to express its views and participate in the decision making process," there is no "significant discussion of the issues" raised during the prior meeting, and the meeting results in a mere "summary approval" of the prior decision. *See Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. 4th DCA 1998) (subsequent meeting was "not a full, open public hearing convened for the purpose of enabling the public to express its views and participate in the decision making process" where "[t]here was no significant discussion of the issues"); *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (town council gave merely summary

approval to the citizens planning committee's recommendations in a purely ceremonial public meeting.); *Port Everglades Authority v. Int'l Longshoremen's Ass'n, Local 1922-1*, 652 So. 2d 1169, 1171 (Fla. 4th DCA 1995) (failure to "conduct a full, open hearing" or otherwise take "independent action in the sunshine" prevented Sunshine Law violation from being cured).

Here, as is evident from the record, the OIR held a full, open public hearing at which it heard testimony and considered public comment as part of its decision-making process. Representatives of Appellee, including a credentialed actuary hired by Appellee, appeared and testified at the public hearing, and provided substantial written comments to the OIR that the OIR considered before issuing its decision. T. 83. Likewise, other members of the board of the Florida Workers' Advocates, a workers' compensation claimants' attorney association for which Mr. Fee is a board member, appeared at and testified at the public hearing. T. 84-85. In addition, the OIR posted on its public website, before the public hearing, hundreds of pages of information made public by NCCI including NCCI's Initial Rate Filing and Amended Rate Filing and substantial supporting documentation relied upon by NCCI. Indeed, all of the information filed by NCCI and reviewed by the OIR in connection with the Amended Rate Filing was posted on the OIR's website weeks before the hearing.

Contrary to assertions that Appellee was not provided with an opportunity to participate in the deliberative process, Appellee, and other members of the public, had significant participation in the hearing process. The facts here strongly resemble *Sarasota Citizens*, where the efficacy of the cure was readily acknowledged by the court.

Also contrary to assertions in the trial court's Order, the public rate hearing did not result in a "summary approval" of a prior decision. This assertion by the trial court is particularly puzzling, as the OIR's process was neither "summary" in nature, nor did it result in an "approval" *at all*. Rather, after a lengthy public hearing and the filing of hundreds of pages of comments, the OIR performed an independent review, analyzed the rate filings and other relevant information and, a month and a half later, issued an order *disapproving* the Amended Rate Filing submitted by NCCI. Thus, even if a Sunshine Law violation occurred, as was the case in *Pigeon Key*, *Sarasota Citizens*, *Tolar*, and *Brucker*, the OIR's public rate hearing was a full, open public hearing which cured any alleged Sunshine Law violation.

III. The Trial Court did not Apply the Correct Law in Determining that NCCI Violated Chapter 119.

The trial court's determination that NCCI, a private corporation, is subject to and violated chapter 119 with respect to rate filings, is erroneous for two principal reasons. First, the trial court failed to apply binding precedent which dictates the

test a trial court must apply to determine whether a private entity is subject to chapter 119. Proper application of this test demonstrates NCCI is not subject to chapter 119 with respect to rate filings. Second, even if chapter 119 did somehow apply to NCCI in the rate filing context, the record is devoid of any evidence that Appellee made a public records request in compliance with section 119.0701.

Section 119.01 imposes public record disclosure and record keeping requirements on government agencies and others acting on behalf of government agencies. Section 119.01 applies to NCCI, a private corporation, only to the extent it has been delegated a governmental function and is acting on behalf of the government. It is undisputed that the requirements of Florida's Public Records Act apply to NCCI when it is gathering data pursuant to its statistical agent contract. The contract states that chapter 119 applies to "documents, paper, letters, or other material subject to the provisions of Chapter 119, Florida Statutes, which are made or received by NCCI *in conjunction with the contract*." Pl. Ex. 27 at 7, 11-12 (emphasis added). The contract also states "nothing herein is intended to expand the scope or applicability of Chapter 119, Florida Statutes, to NCCI." *Id.* at 12.

NCCI's rating organization and rate filing functions are not part of its statistical agent contract. NCCI does not perform any delegated governmental function, or act on behalf of the government, when it prepares and makes such rate filings. T. 150-52, 191-92. Even though the trial court expressly ruled "NCCI is

subject to chapter 119, with respect to its role as a licensed rating organization in preparing a rate filing," (R. 543), the trial court declared "irrelevant" and failed to apply the Florida Supreme Court's totality of the factors test that must be applied to determine whether a private entity is subject to chapter 119. *See* R. 540.[8] The trial court's determination is thus fundamentally flawed and contrary to law.

Applying the nine factor "totality of factors" test set out in *News & Sun Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992), as is required, shows that NCCI is not subject to chapter 119 when it performs its rating organization functions and makes rate filings on behalf of its insurance company subscribers. With respect to the first factor, NCCI does not receive any public funding. Second, as NCCI receives no public funds, it likewise does not commingle such funds. Third, NCCI does not perform any of its functions on publicly owned property. The fourth factor is "whether [the] services contracted for are an integral part of the public agency's decision-making process." Here, the OIR has not contracted with NCCI to make workers' compensation rate

[8] The only instance in which the application of the totality of factors test may be unnecessary is "where the facts compel the conclusion that a public agency has transferred or delegated its statutory responsibility to a private entity." *Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 927 So. 2d 961, 966 (Fla. 5th DCA 2006). The trial court did not identify any statutory responsibility of the OIR that had been transferred or delegated to NCCI with regard to rate filings.

filings.[9] Fifth, courts must consider "whether the private entity is performing a governmental function or a function which the public agency would otherwise perform." Pursuant to Florida law, the rate filing function performed by NCCI would be performed by private insurers or another licensed rating organization, not the OIR, if NCCI did not exist. Sixth, courts must inquire as to "the extent of the public agency's involvement with, regulation of, or control over the private entity." The OIR's only involvement with, regulation of, or control over NCCI with regard to workers' compensation rate filings is that pursuant to statute, the OIR must review and either approve or disapprove the rate filings made by NCCI. The OIR does not have any statutory authority or responsibility to make rate filings. Seventh, courts must consider "whether the private entity was created by the public agency." NCCI, a private corporation, was not created by the OIR. Eighth, courts must consider "whether the public agency has a substantial financial interest in the private entity." The OIR has no financial interest in NCCI. Ninth, courts must

[9] To the degree the Order is based on the premise that the simple act of making a rate filing in the first place is "an integral part of" the OIR's decision whether to approve such a filing, this incorrect argument, if upheld, would subject every person involved in a regulated industry to the public records law since, for example, the act of applying for a contractor's license would similarly be "an integral part" of the Department of Business and Professional Regulation's decision whether to issue a contractor's license; filing a tax return would likewise be "an integral part" of the Department of Revenue determining what taxes are due, etc.

consider "for whose benefit the private entity is functioning." As discussed at length above, NCCI files rates on behalf of insurers, which benefit from not having to incur the substantial time and expense to prepare their own rate filings. NCCI does not operate for the benefit of the OIR when NCCI makes its rate filings.

None of the nine factors enumerated by the Florida Supreme Court in *Schwab* supports application of chapter 119 to NCCI in the context of rate filings. Because NCCI is not a government agency, does not act on behalf of a government agency when it makes rate filings, and has not been delegated an otherwise public, governmental responsibility with respect to rate filings, chapter 119 does not apply to NCCI in the rate filing context.

Next, even assuming *arguendo* that NCCI *was* subject to the public records laws, the trial court's conclusion that NCCI violated chapter 119 is unsupportable. While Appellee made certain requests to NCCI pursuant to section 627.291(1), there is no evidence that Appellee ever made a request *for public records* from NCCI. As NCCI is a private entity which is only subject to the public records act in a limited respect as a result of a statistical agent contractual relationship, public records requests for materials held by NCCI must be made pursuant to the procedures set forth in section 119.0701(3)(a), Florida Statutes. Section 119.0701(3)(a) states that "A request to inspect or copy public records relating to a public agency's contract for services must be made directly to the public agency. If

the public agency does not possess the requested records, the public agency shall immediately notify the contractor of the request, and the contractor must provide the records to the public agency or allow the records to be inspected or copied within a reasonable time." There is no evidence that Appellee or his representatives made such a request to the OIR. This fact alone precludes a finding that NCCI has violated the public records laws.

IV. No Violation of Section 627.291(1), Florida Statutes Occurred.

The trial court's determination that NCCI violated section 627.291(1) is erroneous for several reasons. First, section 627.291(1) requires insurers and rating organizations to produce only "pertinent information" regarding a rate by which the insured is actually affected. Here, the rate filings for which Appellee sought information never became effective, and therefore never affected any insured. Second, record evidence demonstrates that Appellee was provided even more information than he was statutorily entitled to, *prior to this suit ever being filed*. In ruling that Appellee was entitled to more information than he was provided, the court interpreted the term "pertinent information" far more broadly than was intended by the Legislature. Third, section 627.291(1) entitles an affected insured to pertinent information regarding a "rate," *not* information regarding rule filings, as Appellee requested. Fourth, Appellee does not hold a

workers' compensation policy and therefore lacked standing to bring suit on behalf of his law firm, which is the only "insured" that could be affected by a rate.

Section 627.291(1) provides that:

> As to workers' compensation and employer's liability insurances, every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon payment of such reasonable charge as it may make, furnish to *any insured affected by a rate* made by it, or to the authorized representative of such insured, *all pertinent information as to such rate*.

§ 627.291(1), Fla. Stat. (Emphasis added). Appellee requested information pursuant to section 627.291(1) relating to NCCI's proposed, and later rejected, Initial and Amended rate filings. At the time Appellee made his requests, section 627.291(1) could not possibly have required NCCI to produce information relating to its filings because an insured cannot be "*affected*" by a proposed rate before it has gone into effect.

The term "affected" has a plain, clear, and well-accepted meaning: "influenced or touched by an external factor." *See* https://en.oxforddictionaries.com/definition/us/affected. Appellee was not and could not be "affected" by a rate that did not go into effect and thus could not have been applied to him. Indeed, because the OIR disapproved NCCI's Amended Rate Filing, which superseded the Initial Rate Filing, the rates proposed in such filings will never go into effect or affect Appellee or anyone else. Only upon a rate filing being approved by the OIR,

being adopted by Appellee's insurer (assuming he had one), and being applied to Appellee without deviation,[10] could Appellee have been "affected" by a rate.

Consistent with this plain statutory language, the OIR has not interpreted section 627.291(1) as requiring NCCI to produce to Appellee any documents relating to the rate filings. The OIR administers the entirety of chapter 627, and its interpretation of section 627.291(1) falls within the permissible range of interpretations, is consistent with the plain language of the statute, and avoids an absurd reading of the statute. It is therefore entitled to deference. *See Farm Bureau Gen. Ins. Co.*, 109 So. 3d 860, 861 ("An agency's interpretation of a statute which it administers will be upheld unless it is clearly erroneous.") (internal citations omitted).

Even though NCCI was not required to provide Appellee any information regarding the 2016 rate filings, it is undisputed that Appellee received, prior to the filing of his lawsuit, all documents NCCI provided to the OIR in support of the 2016 rate filings. T. 196-97. Appellee asserted below that he is entitled to receive from NCCI internal correspondence and other documents that NCCI did not provide to the OIR to support its filings. Appellee is not entitled to such

[10] Insurers may subscribe to the rate filed by a rating organization, but also seek certain deviations (rate increases or decreases) from the filing. § 627.211, Fla. Stat.; T. 185-86. Such deviations must be approved by the OIR. *Id.*

documents because they exceed the scope of "pertinent information" an insured is entitled to receive from licensed rating organizations and private workers' compensation insurers pursuant to section 627.291(1), Florida Statutes.[11] Interpreting section 627.291(1) to require licensed rating organizations and private insurers to produce, on demand, internal documents that bear *any* relation to rate filings, even if such documents were not filed with the OIR and played no part in whether such filings were approved or disapproved, would be an absurd interpretation of the statute, and would subject private entities to more stringent open records requirements than are applicable to public agencies.

Statutory sections related to section 627.291(1) provide helpful context and demonstrate the absurdity of the trial court's ruling. For example, section 627.091(3) requires that a rate filing and any "supporting information" be open to public inspection. Supporting information, as specified by section 627.091(2), includes: "(a) The experience or judgment of the insurer or rating organization making the filing; (b) *Its* interpretation of any statistical data *it relies upon*; (c) The

[11] Appellee also asserted that the OIR should have requested additional information from NCCI prior to issuing its order approving NCCI's revised rate filing. This assertion relates to the OIR's analysis of NCCI's rate filings and the merits of the OIR's Final Order. The merits of the OIR's Final Order were not the subject of the trial court proceeding, as any challenge to the OIR's Final Order had to be filed pursuant to the administrative process described in the Notice of Rights attached to the OIR's Final Order. No such challenge was filed by Appellee or anyone else.

experience of other insurers or rating organizations; or (d) Any other factors which the *insurer or rating organization deems relevant*." § 627.091(2), Fla. Stat. (emphasis added). The Legislature clearly contemplated what records the public was entitled to in the rate filing context, which as enumerated in section 627.091(2), is information the rating organization *actually* relied upon and any other information *the rating organization* deemed relevant. The trial court's Order finds that Appellee is essentially entitled to any other information that Appellee deems to be pertinent, including information NCCI did not rely upon in making its rate determinations, internal correspondence, and, seemingly, whatever other information Appellee desires. The trial court's Order would therefore grant to insureds more access to NCCI's confidential information than is provided to the OIR and, under the auspices of the public records act, would bypass the legislatively dictated mechanism for approving a rate determination.

Indeed, section 627.091(5) provides the mechanism the OIR must utilize if it desires to review information underlying rate filings which is not provided to the OIR, and states "[p]ursuant to the provisions of s. 624.3161, the office may examine the underlying statistical data used in such filings." § 627.091(5), Fla. Stat. Section 624.3161, and the statutes cited therein, provide that records provided during such examination remain confidential. Appellee thus asserts that

section 627.291(1) provides insureds in Florida unlimited access to insurer information even the OIR would be legally required to maintain as confidential.

In addition, although Appellee demanded information regarding rule filings in addition to rate filings, section 627.291(1) entitles an affected insured only to pertinent information regarding a "rate," not information regarding "rule filings," which are distinct from rate filings. Part I of chapter 627 defines a "rate" as meaning "the unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or covered thereunder is multiplied to determine the premium." § 627.041(1), Fla. Stat. This same statutory chapter repeatedly distinguishes "rates" from "rules." Given chapter 627's repeated references to "rules," the Legislature was aware of how to refer to rule filings if it intended to provide insureds with access to information regarding rule filings rather than merely "rates" as the statute states. Thus, pursuant to basic principles of statutory interpretation, the Legislature's provision of access to information regarding "rates" cannot be interpreted as silently creating a right of access to information regarding "rules." *See, e.g., State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997) ("The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.").

Moreover, the evidence presented at hearing demonstrates that Appellee lacked standing to assert a violation of section 627.291(1) because Appellee is not

a named insured on a workers' compensation insurance policy issued in Florida. Rather, the workers' compensation policy that Plaintiff relies on in support of his section 627.291 claim was issued to a separate legal entity—Druckman and Fee, P.A. (T. 73), and Plaintiff's request to NCCI seeking information regarding the Initial and Amended Rate Filings is made in the name of Druckman and Fee, P.A. Pl. Ex. 1. Appellee filed this lawsuit individually, not on behalf of Druckman and Fee, P.A. T. 73. It is a well-accepted legal principle that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Corporate Express Office Prods. v. Phillips*, 847 So. 2d 406, 411 (Fla. 2003). Accordingly, Appellee does not have standing to bring a claim against NCCI for violation of section 627.291(1).

In sum, no violation of section 627.291(1) occurred because: (1) neither of the rate filings were approved and therefore no insured was, or could have been, "affected" by those rates; (2) Appellee received all "pertinent information" to which he could possibly have been entitled regarding the proposed rates; and (3) Appellee was not an insured and lacked standing to bring a claim for violation of section 627.291(1).

CONCLUSION

For the foregoing reasons, NCCI respectfully requests this Court reverse the trial court's Final Judgment and award such other relief as is just and proper.

Respectfully submitted this 11th day of January, 2017.

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I HEREBY CERTIFY that the type size and style used in this brief is double-spaced 14-point Times New Roman, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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