

# PROPOSED RULEMAKING

## DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 121]

### Special Funds Assessments

The Department of Labor and Industry (Department), Bureau of Workers' Compensation (Bureau), proposes to provide clarifications and detailed guidance for the uniform application of section 2218 of the act of November 26, 1997 (P. L. 530, No. 57) (Act 57), as it affects the Pennsylvania Workers' Compensation Act (act) (77 P. S. §§ 1—2626). The Department proposes to amend §§ 121.1, 121.22 and 121.23 (relating to definitions; subsequent injury fund; and the supersedeas fund) insofar as they address assessments for the Subsequent Injury and Supersedeas Funds. In addition, the Department proposes to add sections to Chapter 121 (relating to general provisions) to implement section 2218 of Act 57 (77 P. S. § 578) and to refine existing procedures for assessment collection and calculation. These amendments are contemplated and designed to both implement the provisions of section 2218 of Act 57 and clarify existing procedures relating to the calculation and collection of assessments for the Subsequent Injury Fund, Supersedeas Fund and Workmen's Compensation Administration Fund (special funds), as well as the assessment authorized under section 1303 of the act (77 P. S. § 1041.3) for the purpose of funding the operation of the Office of Small Business Advocate.

#### *Statutory Authority*

These amendments are proposed under the authority of section 2218 of Act 57, which provides: "[T]he assessments for the maintenance of the Subsequent Injury Fund, the Workmen's Compensation Supersedeas Fund and the Workmen's Compensation Administration Fund under sections 306.2, 443 and 446 of the act . . . shall no longer be imposed on insurers but shall be imposed, collected and remitted through insurers in accordance with regulations promulgated by the Department of Labor and Industry." These amendments are proposed under the additional authority of sections 401.1 and 435 of the act (77 P. S. §§ 710 and 991), which provide that the Department will adopt regulations which are necessary or desirable for the explanation and enforcement of the act and which are reasonably calculated to provide interested parties with their rights and obligations under the act.

#### *Background*

On November 26, 1997, Governor Tom Ridge signed into law Act 57, which amended sections 306.2, 443 and 446 of the act (77 P. S. §§ 517, 999 and 1000.2). The amendment is designed to allow the imposition, collection and remittance of assessments "through" insurers on behalf of employers, rather than the imposition of assessments "on" insurers. In an effort to streamline the assessment and collection procedures, this proposed rulemaking fulfills the Legislative directive which states that this change shall be effected "in accordance with regulations promulgated by the Department of Labor and Industry." This proposed rulemaking further clarifies and amends existing sections of Chapter 121, and adds new sections to implement section 2218 of Act 57.

#### *Purpose*

The purpose of these proposed amendments is to effectuate the provisions of section 2218 of Act 57 and to clarify and enforce the provisions of the act which provide for assessments for the special funds and the Office of Small Business Advocate. In addition, these proposed amendments clarify procedures relating to operations of the special funds.

#### *Affected Persons*

Those affected by these proposed amendments are private and public sector employers in this Commonwealth, workers' compensation insurance carriers, self-insured employers and injured workers.

#### *Fiscal Impact*

There is no significant fiscal impact associated with this proposed rulemaking. These amendments require no new forms nor do they result in any significant costs to the Commonwealth. Similarly, these proposed amendments have been written to prevent any significant costs to the regulated community associated with their implementation.

#### *Summary of Proposed Rulemaking: Chapter 121*

These proposed amendments provide detailed guidance for the imposition, collection and remittance of assessments for the special funds through insurers in accordance with section 2218 of Act 57. In addition, the Department proposes amendments intended to clarify that self-insured employers and runoff self-insurers remain liable for assessments for the special funds.

The Department, through this proposed rulemaking, proposes amending § 121.1 to include definitions for the following terms: "act"; "approved rating organization"; "Bureau"; "Department"; "earned premium"; "insurance carrier"; "insured employer"; "insurer"; "runoff self-insurer"; "self-insured employer"; and "special funds." The amendment to this section are intended to define terms used throughout this chapter and to clarify assessment procedures by defining terms to correspond to Chapter 125 (relating to workers' compensation self-insurance).

The Department has proposed an amendment to § 121.22. This amendment is intended to provide a means of calculating and collecting assessment amounts under Act 57. These assessments will be collected from insured employers, through insurance carriers, according to the procedures defined by the approved rating organization and approved by the Insurance Commissioner (Commissioner). Insurance carriers shall be responsible for collecting these assessments and timely remitting them to the Department in accordance with the formula in this section.

The Department additionally has proposed an amendment to § 121.23. These amendments are intended to provide a means of calculating and collecting assessment amounts under Act 57. The amendment specifies that, for calculation of supersedeas fund assessment amounts, the total amount reimbursed from the fund in the preceding calendar year includes both: 1) amounts expended from the fund; and 2) amounts accrued as payable from the fund during the preceding year. In addition, the amendment provides that Applications for Supersedeas Fund Reimbursement will be reviewed administratively and will be assigned to a Workers' Compensation Judge only when the payment or amount of reimbursement cannot be

agreed upon, thus conserving judicial resources for contested applications. This assessment will be collected from insured employers, through insurance carriers, according to the procedures defined by the approved rating organization and approved by the Commissioner. Insurance carriers shall be responsible for collecting these assessments and timely remitting them to the Department in accordance with the formula in this section.

The Department, through this proposed rulemaking, proposes to amend Chapter 121 by adding §§ 121.31—121.34.

The Department proposes the addition of § 121.31 (relating to Workmen's Compensation Administration Fund). This proposed regulation provides the calculation necessary for determining the appropriate assessment amount for the Workmen's Compensation Administration Fund. This assessment will be collected from insured employers, through insurance carriers, according to the procedures defined by the approved rating organization and approved by the Commissioner. Insurance carriers shall be responsible for collecting these assessments and timely remitting them to the Department in accordance with the formula in this section.

The Department further proposes that Chapter 121 be amended by adding § 121.32 (relating to Office of Small Business Advocate). This amendment provides for calculation of the appropriate assessment amount for the Office of Small Business Advocate. Self-insured employers and runoff self-insurers are not subject to this assessment, which is an assessment solely on insurance carriers. Currently the Department collects this assessment under the authority of a preexisting memorandum of understanding between the Department and the Insurance Department. The memorandum of understanding requires that the Department "continue to make the assessments required by section 1303 of the Workers' Compensation Act, on behalf of the Insurance Department, against workers' compensation insurers for the operations of the Office of Small Business Advocate related to filings made by rating organizations." To this extent, these amendments are necessary to allow the Department to meet its obligations under the memorandum of understanding. The assessment for the Office of Small Business Advocate will be collected from insurance carriers according to the ratio which each insurance carrier's payments of compensation bears to the total amount of compensation paid by all insurance carriers in the preceding calendar year, multiplied by the approved budget of the Office of Small Business Advocate for the current fiscal year.

Section 121.33 (relating to collection of special funds assessments) of the proposed rulemaking is designed to establish a procedure for collecting assessments in accordance with section 2218 of Act 57. The proposed section establishes that insurers, on behalf of their insured employers, are responsible to the Department for the imposition, collection and remittance of certain assessments. This confirms the language of Act 57, which states: "The assessments for the maintenance of the Subsequent Injury Fund, the Workmen's Compensation Supersedeas Fund and the Workmen's Compensation Administration Fund under sections 306.2, 443 and 446 of the act . . . shall no longer be imposed on insurers but shall be imposed, collected and remitted through insurers."

Section 121.34 (relating to objections to assessments) of the proposed rulemaking proposes the adoption of procedures for insurers' objections to assessments. This proposed section provides that objections by insurers must be

made within 15 days of receipt of the "Notice of Assessment Amount to be Collected" issued under § 121.33. Objections must be in writing and specifically state the facts necessary to determine the validity of the challenge. Upon receipt of objections conforming to these proposed regulations, the Department will hold a hearing in accordance with 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure). After the hearing, the Department will transmit its findings on the objections to the objecting party. With respect to insured employers, this proposed rulemaking states that insured employers retain all rights conferred by section 717 of the act (77 P. S. § 1035.17).

The Department, through this proposed rulemaking, also proposes the addition of § 121.35 (relating to annual reports of compensation paid). This section clarifies that reports of compensation paid shall include amounts paid by an insurer for which policyholders have agreed to reimburse the insurer under deductible policies issued under section 448 of the act (77 P. S. § 1000.4). This section is meant to clarify that compensation includes all compensation paid whether paid under deductible or nondeductible policies and regardless of whether amounts are reimbursed by insured employers under deductible policies.

#### *Effective Date*

These proposed amendments will be effective on publication and shall apply to all assessments issued on or after July 1, 1998.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 26, 1998, the Department submitted copies of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Labor Relations Committee and the Senate Labor and Industry Committee (Committees). In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, Regulatory Review and Promulgation. A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendments, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion of the proposed amendments. The Regulatory Review Act specifies detailed procedures for review by the Department, the General Assembly and the Governor, of objections raised prior to final publication of the final-form regulations.

#### *Public Comment and Contact Person*

For further information regarding this proposed rulemaking, interested parties may contact Richard A. Himler, Director, Bureau of Workers' Compensation, P. O. Box 15121, Harrisburg, PA 17105-5121. Interested persons are invited to submit written comments to Richard A. Himler, Director, at this address, within 30 days following publication in the *Pennsylvania Bulletin*. Written comments received by the Department may be made available to the public.

JOHNNY J. BUTLER,  
*Secretary*

**Fiscal Note:** 12-53. No fiscal impact; (8) recommends adoption.

Annex A  
**TITLE 34. LABOR AND INDUSTRY**  
**PART VIII. BUREAU OF WORKERS'**  
**COMPENSATION**  
**CHAPTER 121. GENERAL PROVISIONS**

**§ 121.1. General.**

(a) [The provisions of this] This chapter [are] has been promulgated in response to the legislative mandate in the [Workers' Compensation Act (77 P. S. §§ 1—1041.4)] act and designed to further the lawful, efficient[, ] and speedy administration of the act. The term employer as used in [the provisions of] this chapter [shall mean] means, where applicable, the insurer thereof and a self-insured employer.

(b) *Definitions.*

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

*Act*—The Workers' Compensation Act (77 P. S. §§ 1—2626).

*Approved rating organization*—One or more organizations situated within this Commonwealth, subject to supervision and to examination by the Insurance Commissioner and approved by the Insurance Commissioner as adequately equipped to perform the functions specified in Chapter 7B of the act (77 P. S. §§ 1035.1—1035.22), on an equitable and impartial basis.

*Bureau*—The Bureau of Workers' Compensation.

*Department*—The Department of Labor and Industry of the Commonwealth.

*Earned premium*—A "direct premium earned" as required to be reported to the Insurance Department on Special Schedule "W," under section 655 of the Insurance Company Law of 1921 (40 P. S. § 815).

*Insurance carrier*—An entity subject to the Insurance Company Law of 1921, including the State Workers' Insurance Fund. The term does not include self-insured employers or runoff self-insurers, with which an employer has insured its liability under section 305 of the act (77 P. S. § 501).

*Insured employer*—An employer which has chosen to insure its workers' compensation liabilities through a workers' compensation insurance carrier licensed to do so in this Commonwealth. The term "employer" when used in this context does not include the insurer thereof.

*Insurer*—A workers' compensation insurance carrier which is licensed to insure workers' compensation liabilities in this Commonwealth and acts in this capacity on the behalf of insured employers. The term includes a self-insured employer and a runoff self-insurer.

*Runoff self-insurer*—An employer that had been a self-insurer but no longer maintains a current permit to self-insure under section 305 of the act.

*Self-insured employer*—An employer which has been granted the privilege to self-insure its liability under the act. The term includes a parent company or affiliate which has assumed a subsidiary's or an

affiliate's liability upon the termination of the parent-subsidiary or affiliate relationship, and a runoff self-insurer.

*Special funds*—Funds maintained under sections 306.2, 443 and 446 of the act (77 P. S. §§ 517, 999 and 1000.2).

**§ 121.22. Subsequent injury fund.**

(a) Compensation for a subsequent injury, as defined in section 306.1 of the [Workers' Compensation Act] act (77 P. S. § 516) shall be paid as follows:

(1) The [insurer] employer shall be responsible for payments due for specific loss under section 306(c) of the [Workers Compensation Act] act (77 P. S. § 513).

(2) Upon expiration of the specific loss period, the Department [of Labor and Industry] will be responsible for additional compensation due for the duration of total disability. [The sum of \$100,000 shall be appropriated to the Department for that purpose. This] The fund established under section 306.2 of the act (77 P. S. § 517), from which these payments are to be made, shall be maintained as follows:

(i) Self-insured employers shall pay assessments in amounts determined by the following:

<p><i>Amount of Compensation Paid by [an Insurer] a Self-insured Employer during the Preceding Calendar Year</i></p> <p style="text-align: center;">×</p> <p><i>Total Amount of Compensation Paid by All Insurers during the Preceding Calendar Year</i></p>	<p>[The Amount Expended] The Amount Expended from the Subsequent Injury Fund during the Preceding Calendar Year</p>
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(ii) The amount expended from the Subsequent Injury Fund during the preceding calendar year, minus the total amount owed by all self-insured employers, as accumulated under the preceding paragraph, shall equal the "Aggregate Amount to be Collected by Insurance Carriers."

(b) [Each insurer will be assessed an amount determined by the formula, except that in the first year assessments will be made at a rate of 200%. Reassessments will be made annually for the continued maintenance of this fund.] Insurance carriers shall collect from insured employers and remit to the Department assessment amounts as follows:

<p><i>Amount of Earned Premium as Reported to the Insurance Department, by an Insurance Carrier, for the Preceding Calendar Year</i></p> <p style="text-align: center;">×</p> <p><i>Total Amount of Earned Premium Reported to the Insurance Department by all Insurance Carriers for the Preceding Calendar Year</i></p>	<p>Aggregate Amount to be Collected by Insurance Carriers</p>
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(c) Insured employers shall remit assessment amounts through their insurance carriers, according to procedures defined by the approved rating organization and approved by the Insurance Commissioner.

(d) Self-insured employers and runoff self-insurers shall be directly responsible to the Department for payment of assessments.

(e) The claimant shall file a petition for additional compensation as provided in section 315 of the [ **Workers' Compensation Act** ] act (77 P. S. § 602) or the claim will be forever barred.

**§ 121.23. The supersedeas fund.**

(a) [ **Under** ] Annual assessments under section 443 of the [ **Workers' Compensation Act** ] act (77 P. S. § 999) [ **each insurer** ] shall be [ **annually assessed an amount as** ] in amounts determined by the following [ **formula** ]:

(1) Self-insured employers shall pay assessments in amounts determined by the following:

$$\frac{\text{Amount of Compensation Paid by [ an Insurer ] a Self-insured Employer during the Preceding Calendar Year}}{\text{Total Amount of Compensation Paid by All insurers during the Preceding Calendar Year}} \times \frac{\text{The Amount of Supersedeas Payments Made or Accrued as Payable during the Preceding Calendar Year}}{\text{Year}}$$

(2) The amount of supersedeas payments made or accrued as payable during the preceding year, minus the total amount owed by all self-insured employers, as accumulated under the preceding paragraph, shall equal the "Aggregate Amount to be Collected by Insurance Carriers."

(3) Insurance carriers shall collect from insured employers and remit to the Department assessment amounts as follows:

$$\frac{\text{Amount of Earned Premium as Reported to the Insurance Department, by an Insurance Carrier, for the Preceding Calendar Year}}{\text{Total Amount of Earned Premium Reported to the Insurance Department by all Insurance Carriers for the Preceding Calendar Year}} \times \text{Aggregate Amount to be Collected by Insurance Carriers}$$

(b) Insured employers shall remit assessment amounts through their insurance carriers, according to procedures defined by the approved rating organization and approved by the Insurance Commissioner.

(c) Self-insured employers and runoff self-insurers shall be directly responsible to the Department for payment of assessments.

(d) Applications for reimbursement shall be filed directly with the Bureau [ **of Occupational Injury and Disease Compensation, Department of Labor and Industry, Harrisburg, Pennsylvania 17120** ], on Form [ **OIDC-662** ] LIBC-662, [ **Request** ] "Application for Supersedeas Fund Reimbursement." [ **All applications shall be promptly assigned to a referee of the Department who shall make a determination as to eligibility for reimbursement, after affording parties in interest, and the Commonwealth, the opportunity for a hearing.** ] Applications will be processed administratively. When the payment or amount of reimbursement cannot be agreed upon, the matter will be assigned to a workers' compensation judge for a formal hearing and adjudication.

**§ 121.31. Workmen's Compensation Administration Fund.**

(a) Annual assessments on self-insured employers, under section 446(b) of the act (77 P. S. § 1000.2(b)), shall be in amounts determined by the following:

$$\frac{\text{Amount of Compensation Paid by a Self-insured Employer during the Preceding Calendar Year}}{\text{Total Amount of Compensation Paid by All Insurers during the Preceding Calendar Year}} \times \frac{\text{The Approved Budget of the Workmen's Compensation Administration Fund for the Current Fiscal Year}}{\text{Year}}$$

(b) The approved budget of the Workmen's Compensation Administration Fund for the current fiscal year, minus the total amount owed by all self-insured employers, as accumulated under the preceding subsection, shall equal the "Aggregate Amount to be Collected by Insurance Carriers."

(c) Insurance carriers shall collect from insured employers and remit to the Department assessments as follows:

$$\frac{\text{Amount of Earned Premium as Reported to the Insurance Department, by an Insurance Carrier, for the Preceding Calendar Year}}{\text{Total Amount of Earned Premium Reported to the Insurance Department by all Insurance Carriers for the Preceding Calendar Year}} \times \text{Aggregate Amount to be Collected by Insurance Carriers}$$

(d) Insured employers shall remit assessment amounts through their insurance carriers, according to procedures defined by the approved rating organization and approved by the Insurance Commissioner.

(e) Self-insured employers and runoff self-insurers shall be directly responsible to the Department for payment of assessments.

**§ 121.32. Office of Small Business Advocate.**

(a) The Department may collect annual assessments imposed on insurance carriers, but not on self-insured employers or runoff self-insurers, for the purpose of funding the Office of Small Business Advocate in accordance with section 1303 of the act (77 P. S. § 1041.3). Insurance carriers shall be directly liable to the Department for prompt payment of assessments for the Office of Small Business Advocate, as provided in the act and this chapter.

(b) Annual assessments under section 1303 of the act shall be in amounts as determined by the following formula:

$$\frac{\text{Amount of Compensation Paid by an Insurance Carrier, but not a Self-insured Employer or Runoff Self-insurer, during the Preceding Calendar Year}}{\text{Total Amount of Compensation Paid by All Insurance Carriers, but not Self-insured Employers or Runoff Self-insurers, during the Preceding Calendar Year}} \times \frac{\text{The Approved Budget of the Office of Small Business Advocate for the Current Fiscal Year}}{\text{Year}}$$

**§ 121.33. Collection of special funds assessments.**

(a) The Department will collect assessments for the special funds by calculating the total amount which:

(1) Each self-insured employer is liable for paying to the Department.

(2) Each insurance carrier is responsible for collecting from insured employers and remitting to the Department.

(b) Assessments for the special funds shall be imposed, collected and remitted as follows:

(1) The Department will transmit to each insurance carrier and self-insured employer a "Notice of Assessment Amount to be Collected," which shall specify the amount calculated under subsection (a) and the date on which the amount is due.

(2) Each self-insured employer shall timely remit to the Department the amount calculated under subsection (a)(1).

(3) Each insurance carrier shall collect payment for assessments from insured employers according to the procedures defined by the approved rating organization and approved by the Insurance Commissioner and timely remit payment to the Department.

(4) The failure of an insurance carrier to receive payment from an insured employer does not limit an insurance carrier's responsibility to collect and timely remit to the Department the total amount calculated under subsection (a)(2).

**§ 121.34. Objections to assessments.**

(a) A party receiving a "Notice of Assessment Amount to be Collected" from the Department may, within 15 days of receipt, object to the assessment reflected in the notice on the basis that it is excessive, erroneous, unlawful or invalid. Objection to assessment does not relieve an insurer of its obligation to promptly remit assessment amounts imposed under section 306.2, 443, 446 or 1303 of the act (77 P. S. §§ 517, 999, 1000.2 and 1041.3). Insured employers retain all rights provided under section 717 of the act (77 P. S. § 1035.17), regarding requests for review and appeals to the Insurance Commissioner.

(b) Objections shall be set forth in numbered paragraphs, specifically state the facts necessary to determine the validity of the challenged assessment or assessment amount and be accompanied by a supporting memorandum documenting the legal grounds for the objection or objections.

(c) Any objection to an assessment or assessment amount shall be accompanied by a Proof of Service as specified in 1 Pa. Code § 33.35 (relating to proof of service) and a notice of appearance as specified in 1 Pa. Code § 31.24 (relating to notice of appearance), and shall be served on all interested parties as specified in 1 Pa. Code § 33.32 (relating to service by a participant).

(d) Any objection not conforming to this section or the act will be rejected by the Department. The Department will notify the objecting party of the specific reasons for rejection. The objecting party shall have 30 days to cure any deficiency.

(e) Upon receipt of an objection which conforms to this section and the act, the Department will hold a hearing in accordance with 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure). After the hearing, the Department will record its findings on the objections and will transmit to the objector, by registered or certified mail, notice of the amount, if any, charged against it in accordance with the findings. That amount shall be paid by the objector within 10 days after receipt of the findings unless within that time the objector initiates an action in the appropriate court to restrain the collection or payment of the assessment.

**§ 121.35. Annual reports of compensation paid.**

Every annual report of compensation paid made by an insurer under sections 445 and 446(e) of the act (77 P. S. §§ 1000.1 and 1000.2(e)) shall include amounts paid by an insurer for which policyholders have agreed to reimburse the insurer under deductible policies issued under section 448 of the act (77 P. S. § 1000.4).

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