

RULES AND REGULATIONS

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 121]

Workers' Compensation Special Funds Assessments

The Department of Labor and Industry (Department), Bureau of Workers' Compensation (Bureau), by this order, adopts the following amendments to clarify and provide detailed guidance for the uniform application of section 2218 of the act of November 26, 1997 (P. L. 530, No. 57) (71 P. S. § 578) (Act 57), as it affects the Pennsylvania Workers' Compensation Act (act) (77 P. S. §§ 1—2626). The Department, by this order, amends §§ 121.1, 121.22 and 121.23 (relating to general; subsequent injury fund; and supersedeas fund) insofar as they address assessments for the Subsequent Injury and Supersedeas Funds. In addition, the Department amends Chapter 121 by adding sections designed to implement section 2218 of Act 57 and refining 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, Supersedeas and Workmen's Compensation Administration Funds (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 adopted 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 adopted 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, the Department proposed amendments which were designed to fulfill the Legislative directive that this change shall be effected "in accordance with regulations promulgated by the Department of Labor and Industry." These proposed amendments were also designed to fur-

ther clarify and amend existing sections of Chapter 121 (relating to general provisions) and add new sections to implement section 2218 of Act 57.

These amendments were published at 28 Pa.B. 4603 (September 5, 1998) in a notice of proposed rulemaking. The Department invited all interested parties to provide written comments to the Department regarding the proposed rulemaking. In response, the Department received comments from Timothy L. Wisecarver and Dale W. Broadwater of the Pennsylvania Compensation Rating Bureau (PCRB) and Coal Mine Compensation Rating Bureau (CMCRB) respectively; Samuel R. Marshall, of the Insurance Federation of Pennsylvania; and Keith T. Bateman, of the Alliance of American Insurers. The Department also received written comments from the Independent Regulatory Review Commission (IRRC) by letter dated November 5, 1998.

This notice of final rulemaking supplants and further clarifies and expands upon the previous interpretation of Act 57 provided in the notice of proposed rulemaking. In response to comments received, some changes have been made to the previously published proposed rulemaking.

Purpose

The purpose of these amendments is to implement 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 amendments clarify procedures relating to the operation of the special funds.

Affected Persons

Those affected by these 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 these amendments. These amendments only require modifications to existing forms and do not result in any significant costs to the Commonwealth. Similarly, these amendments have been written to prevent any significant costs to the regulated community associated with their implementation.

Response to Comments

The following addresses the concerns found in the comments received from the public and IRRC.

(1) The PCRB, CMCRB and IRRC suggested that the term "earned premium," as defined in § 121.1(b), be refined to exclude coverages which do not relate to the operations of the special funds. The Department agrees. Accordingly, the definition of "earned premium" in § 121.1(b) has been changed to reflect that premium amounts earned on certain types of coverages may not be taken into account in calculating assessments.

(2) The PCRB and CMCRB noted that Special Schedule W, on which earned premium is reported, is filed not only by individual insurance carriers, but by groups of affiliated insurance carriers, and that the regulations, as proposed, might not permit this practice. This result was not intended by the Department, and, in fact, the Bureau currently classifies assessment accounts by affiliated in-

surer groups. Therefore, the definition of "insurance carrier" in § 121.1(b) has been amended to expressly include groups of affiliated insurance carriers.

(3) The PCRB and CMCRB noted that in some instances, an insurance carrier may report an amount of earned premium that is less than zero. The commentators acknowledge that a formula incorporating negative values would be administratively burdensome and suggest that any negative earned premium amounts be entered into the appropriate formulas as zero. The Department agrees that amounts of earned premium reported as a negative number should be entered into the appropriate assessment formula as zero. Therefore, §§ 121.22, 121.23 and 121.31 have been amended accordingly.

(4) The PCRB and CMCRB questioned the Department's use of different formulas for calculating the special funds and argued that all assessments for the special funds should be based upon the same period of time (fiscal year or calendar year) and the same type of information (amount paid / accrued or budget amount). The commentators' suggestions, however, cannot be incorporated into the rulemaking in light of the statutory basis for the assessments. The relevant statutory authority for each assessment defines the appropriate time period and informational basis for each assessment, and the Department is bound to adhere to the criteria set forth by the Legislature. As stated in the act, assessments for the Administration Fund are due on or before January 31 of each year (77 P. S. § 1000.2). Similarly, notice of assessment for the Supersedeas Fund is to be provided on or before June 30 of each year with payment due within 30 days of the notice (77 P. S. § 999). In addition, payment for the Subsequent Injury Fund assessment is made on an annual basis under section 306.2 of the act (77 P. S. § 517); this assessment was, per statute, originally issued at the end of the 1971-1972 fiscal year and is currently issued in conjunction with the annual assessment for the Supersedeas Fund (77 P. S. § 999).

(5) The PCRB and CMCRB remarked that §§ 121.22(b), 121.23(a)(3) and 121.31(c) are confusing in that they appear to require that each insurance carrier collect an exact amount from all of its insured employers. Of course, lapses in policies and variations among insurance carriers business practices make adherence to an exact collection administratively burdensome, if not impossible. In keeping with the intent of Act 57, the Department's use of the term "collect" was designed to establish that assessments are to be imposed, collected and remitted through insurers. The Department did not intend to bind insurers to an impossible task. Therefore, the Department has incorporated the suggestions of the commentators and amended these sections to clarify that insurance carriers shall remit assessment amounts to the Department according to the appropriate formulas. The Department believes that §§ 121.22(d), 121.23(c), 121.31(d) and 121.33(b)(3) sufficiently establish that assessments shall be imposed, collected and remitted through insurers.

(6) The PCRB, CMCRB and IRRC noted that § 121.34(a) concerning objections to assessments is somewhat redundant and confusing in light of § 121.34(e). Section 121.34(a) provides: "Objection to assessment does not relieve an insurer of its obligation to promptly pay assessment amounts imposed under the [Act]." The commentators stated that § 121.34(e) already requires that payment be made within 10 days of the objecting party's receipt of the Department's findings and notice of the amount charged against the objecting party. The Depart-

ment agrees that the section, as written, may be confusing. Therefore, the Department has deleted the language from § 121.34(a) and revised § 121.34(e) to reflect that payment must be made within 10 days after receipt of the Department's findings and, in accordance with sections 443 and 446 of the act before the commencement of any action to recover amounts paid pursuant to those findings.

(7) IRRC suggested that use of the term "accumulated" in §§ 121.22(a)(2)(ii), 123.23(a)(2) and 121.31(b) is confusing. The Department agrees with IRRC's suggestion that "accumulated" be replaced with "calculated" and has made changes to reflect IRRC's comments.

(8) IRRC commented that §§ 121.22(e), 121.23(d) and 121.31(f) are unclear in their attempt to establish that self-insured employers and runoff self-insurers must pay assessments directly to the Department. The Department agrees that a clarification is in order and thus adopts the language suggested by IRRC.

(9) IRRC commented that § 121.23(e), relating to the Supersedeas Fund, is unclear in its attempt to establish that all applications will be reviewed administratively to determine whether judicial resolution is necessary. The regulation has been revised to address IRRC's concerns.

(10) The Alliance of American Insurers expressed concern that the amendments do not adequately protect insurers from taxes which they may be required to pay in other states. In response, the Department maintains that these amendments were crafted within the limited framework of the act and Act 57. Similarly, the Department has adopted these regulations to fulfill the legislative directive of Act 57. Therefore, it is the Department's belief that it has adequately responded to the needs of the regulated community in proposing and adopting these amendments.

Reporting, Recordkeeping and Paperwork Requirements

The amendments do not require the creation of any new forms, and required few modifications to existing forms. All data which is required by the regulations is currently maintained by the Insurance Department and the approved compensation rating organizations. Therefore, the regulations do not impose any additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community.

Sunset Date

No sunset date is necessary for these amendments. These regulations will be continuously monitored, because the Department regularly issues the assessments regulated by these regulations. Issues regarding the regulations' effectiveness, clarity or impartiality can be easily addressed through the specified objection procedures and communications between employers, insurers and the Department. If needed, corrections can be made based on information received in those proceedings and communications.

Effective Date

These amendments will be effective on publication in the *Pennsylvania Bulletin* and will 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 September 5, 1998, the Department submitted copies of the proposed rulemaking, published at 28 Pa.B. 4603, to IRRC and to the Chairpersons of the House Labor Relations Committee and the Senate Labor

and Industry Committee (Standing Committees) for review and comment. IRRRC and the Standing Committees were provided with copies of the comments received during the public comment period.

In preparing these final-form regulations, the Department has considered all comments received from IRRRC, stakeholders and the public.

These final-form regulations were deemed approved by the House and Senate Committees on April 5, 1999. IRRRC met on April 8, 1999, and approved the amendments in accordance with section 5.1(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

Contact Person

The contact person is Richard A. Himler, Director, Bureau of Workers' Compensation, Department of Labor and Industry, (717) 783-5421, 1171 South Cameron Street, Room 324, Harrisburg, PA 17104.

Findings

The Department finds that:

(1) Public notice of intention to amend the administrative regulations amended by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendment of the regulations of the Department in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Department, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 34 Pa. Code Chapter 121, are amended by adding §§ 121.31—121.35 and by amending §§ 121.1, 121.22 and 121.23 to read as set forth in Annex A.

(b) The Secretary shall submit this order and Annex A to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin* and will apply to all assessments issued on or after July 1, 1998.

JOHNNY J. BUTLER,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 29 Pa.B. 2195 (April 24, 1999).)

Fiscal Note: Fiscal Note 12-53 remains valid for the final adoption of the subject regulations.

Annex A

**TITLE 34. LABOR AND INDUSTRY
PART VIII. BUREAU OF WORKERS'
COMPENSATION**

CHAPTER 121. GENERAL PROVISIONS

§ 121.1. General.

(a) *Purpose.* This chapter has been promulgated in response to the legislative mandate in the act and

designed to further the lawful, efficient and speedy administration of the act. The term "employer" as used in this chapter means, when 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 Pennsylvania 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.

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). For the purposes of this chapter, direct premium earned may not include:

(i) The effects of premium credits granted under deductible elections by insured employer.

(ii) Premiums not attributable to coverage under the act or The Pennsylvania Occupational Disease Act (77 P. S. §§ 1201—1603).

(iii) Premiums attributable to excess policies written for specified retentions on self-insured employers.

Insurance carrier—An entity or group of affiliated entities subject to The Insurance Company Law of 1921 (40 P. S. §§ 341—477d), including the State Workers' Insurance Fund, but not including 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 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 act (77 P. S. § 516) shall be paid as follows:

(1) The employer is responsible for payments due for specific loss under section 306(c) of the act (77 P. S. § 513).

(2) Upon expiration of the specific loss period, the Department will be responsible for additional compensation due for the duration of total disability. 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:

$$\frac{\text{Amount of Compensation Paid by a Self-insured Employer During the Preceding Calendar Year}}{\text{Total Amount of Compensation Paid by All Insurers During the Preceding Calendar Year}} \times \text{The Amount Expended from the Subsequent Injury Fund during the Preceding Calendar Year}$$

(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 calculated under subparagraph (i), shall equal the aggregate amount to be collected by insurance carriers.

(b) Insurance carriers shall remit to the Department assessment amounts as follows:

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

(c) If the amount of earned premium as reported to the Insurance Department, by an insurance carrier, for the preceding calendar year is less than zero, the Department will calculate the assessment amount as though an earned premium amount of zero were reported to the Insurance Department.

(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 pay assessments directly to the Department.

(f) The claimant shall file a petition for additional compensation as provided in section 315 of the act (77 P. S. § 602) or the claim will be forever barred.

§ 121.23. Supersedeas fund.

(a) Annual assessments under section 443 of the act (77 P. S. § 999) shall be in amounts determined by the following:

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

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

(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 calculated under paragraph (1), shall equal the aggregate amount to be collected by insurance carriers.

(3) Insurance carriers shall 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) If the amount of earned premium as reported to the Insurance Department, by an insurance carrier, for the preceding calendar year is less than zero, the Department will calculate the assessment amount as though an earned premium amount of zero were reported to the Insurance Department.

(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 pay assessments directly to the Department.

(e) Applications for reimbursement shall be filed directly with the Bureau on Form LIBC-662, "Application for Supersedeas Fund Reimbursement." Applications will be processed administratively to determine whether the parties can agree on the payment or amount of reimbursement. If 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:

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

(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 calculated under subsection (a), shall equal the aggregate amount to be collected by insurance carriers.

(c) Insurance carriers shall remit to the Department assessment amounts as follows:

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

(d) If the amount of earned premium as reported to the Insurance Department, by an insurance carrier, for the preceding calendar year is less than zero, the Department will calculate the assessment amount as though an earned premium amount of zero were reported to the Insurance Department.

(e) 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.

(f) Self-insured employers and runoff self-insurers shall pay assessments directly to the Department.

§ 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:

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

§ 121.33. Collection of special funds assessments.

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

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

(2) What 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 any 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. Insured employers retain all rights provided under section 717 of the act (77 P. S. § 1035.17).

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

(c) An objection to 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) An 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 the 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 any 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. The amount shall be paid by the objector within 10 days after receipt of the findings. After payment has been made, the objector may initiate an action in the appropriate court to recover the payment of the assessment or any portion thereof. No insurer may maintain an action to recover payment unless it has previously objected under subsection (a).

§ 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 reim-

burse the insurer under deductible policies issued under section 448 of the act (77 P. S. § 1000.4).

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