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October 2, 1998

VIA HAND DELIVERY

Mr. Richard E. Himler
Director
Bureau of Workers' Compensation
P. O. Box 15121
Harrisburg, PA 17105-5121

RE: Proposed Rulemaking - Department of Labor and Industry
34 Pa. Code Ch. 121 - Special Funds Assessments

Dear Director Himler:

This letter and the narrative which accompanies it are written in response to the above referenced subject, as published in the Pennsylvania Bulletin, Volume 28, Number 36 on September 5, 1998.

As you know, the Pennsylvania Compensation Rating Bureau (PCRB) and the Coal Mine Compensation Rating Bureau of Pennsylvania (CMCRB) are the licensed rating organizations for workers compensation insurance in Pennsylvania. The PCRB serves as the licensed rating organization for workers compensation insurance other than coal mine exposures in the Commonwealth, while the CMCRB serves in that same capacity for workers compensation insurance pertaining to coal mine exposures in the Commonwealth. Recognizing the commonality of the functions and interests of our organizations as respects this matter, we have prepared and are submitting our comments jointly herein in lieu of presenting separate and substantially duplicative documents.

Please feel free to contact either or both of the undersigned in the event you have any questions in this matter or if we may be of any assistance to you or other Bureau of Workers' Compensation staff in the ongoing process of implementing final rules pertaining to Special Funds Assessments.

Sincerely,

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Enclosure

Pennsylvania Compensation Rating Bureau (PCRB)

Coal Mine Compensation Rating Bureau of Pennsylvania (CMCRB)

Comments on Proposed Rulemaking by Department of Labor and Industry

Title 34, Part VIII, Chapter 121

Pennsylvania Bulletin, Vol. 28, No. 36, September 5, 1998

The PCRB and CMCRB respectfully offer the following comments regarding the proposed rulemaking published by the Department of Labor and Industry (Department) as referenced above.

Overview

PCRB and CMCRB were afforded the opportunity to review and discuss predecessor drafts of the proposed rule during its development by the Department and appreciate the Department's accessibility and objectivity at various points during that process. Further, PCRB and CMCRB understand that the Department must necessarily balance various potentially conflicting and complex considerations (i.e., accuracy, equity and practicality in the context of full compliance with statutory language) in proposing this rule.

Throughout the consideration of the matters addressed in these comments we have enjoyed the benefit of exchanges of ideas and information with the Insurance Federation of Pennsylvania (IFP). While PCRB and CMCRB present the following comments in the expectation that they may be useful to the Department as it proceeds toward adoption of final rules and while we accept responsibility for any errors, omissions or related issues arising from our comments, PCRB and CMCRB would note and acknowledge that the original suggestions and comments regarding some of the matters addressed herein resulted from the thoughts and efforts of IFP staff and members, for which we are grateful.

In general terms the PCRB and CMCRB believe that the proposed rulemaking provides a potentially equitable and practical basis for the implementation of provisions of H.B. 1027 or Act 57 of 1997. In recognition of the provisions of that legislation the PCRB and CMCRB have each previously made filings with the Insurance Commissioner, which were approved effective July 1, 1998, as interim means of implementing the Special Fund assessments on employers under the law. Those filings are expected to remain in effect until successor filings recognizing the final form of rules adopted by the Department of Labor and Industry are prepared by the rating organizations and submitted to and approved by the Insurance Commissioner, thus maintaining compliance with the law and pertinent administrative rules on an ongoing basis.

While taking no material conceptual issue with the proposed rulemaking, PCRB and CMCRB are of the opinion that in some key respects additional clarification of procedures specified therein could be beneficial to the several parties to the ultimate implementation and ongoing administration of this rule. Toward that objective the following comments and suggestions are made.

Points of Clarification

121.1 (b) Definitions. "Earned premium"

The proposed rule defines "earned premium" as follows:

> 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).

Data reported on the Special Schedule "W" in Pennsylvania can be used to derive a variety of direct premium earned amounts. The proposed rulemaking appears to be permissive as to the precise component(s) from Special Schedule "W" which are to be considered as "direct premium earned." Ideally, the direct premium earned used to allocate payment of the special funds addressed in the proposed rulemaking should be direct premium earned by insuring exposures which could produce or require expenditures from those same funds. This consideration would suggest that the following features of the "direct premium earned" should be used for such allocation purposes:

"Direct premium earned" should include:

(a) Premiums earned insuring benefits under the Pennsylvania Workers Compensation Act including coal mine exposures.

(b) Effects of premium adjustments produced by retrospective rating plans. Such adjustments reflect, within limits, either more favorable or more adverse loss experience than that supported by the guaranteed cost rates in effect in the Pennsylvania market. Such demonstrated superiority or inferiority would likely also be reflected in levels of required adjudicatory intervention from the Bureau of Workers Compensation, Department of Labor and Industry, and in potential obligations to be paid from the Subsequent Injury Fund and Supersedeas Fund respectively.

(c) Effects of premium adjustments produced by premium discount plans. Such adjustments reflect the decline of expense needs as a percentage of premium as policy size increases. As the potential needs for adjudication of claims by the Bureau of Workers Compensation, Department of Labor and Industry, and potential obligations to be paid from the Subsequent Injury Fund and Supersedeas Fund respectively are functions of

loss experience rather than expense costs, this adjustment would serve to make the allocation basis more consistent with the potential special fund obligations arising from the policies in question.

(d) Effects of premium adjustments produced by deviation and loss cost multiplier adjustments, premium credits for the Pennsylvania Certified Safety Committee Program, and premium adjustments arising from schedule rating plans and the Merit Rating Plan. While these programs collectively reflect prospective expectations about loss experience rather than demonstrated past experience as is the case for retrospective rating plans, the rationale for including effects of these programs in the allocation base for the special funds is otherwise similar to that articulated above for retrospective rating plans.

"Direct premium earned" should exclude:

(a) Effects of premium credits granted under deductible elections by insured employers. Claims incurred under various deductible provisions are not inherently less likely to require adjudicatory intervention from the Bureau of Workers Compensation, Department of Labor and Industry, than are claims incurred under standard, first-dollar coverage. Further, provisions of the Subsequent Injury Fund and Supersedeas Fund are equally applicable to claims incurred under deductible coverages and standard, first-dollar coverage.

(b) Premiums attributable to coverage under various federal benefit programs including the Federal Employers' Liability Act (FELA), the Jones Act, black lung, the United States Longshore and Harborworkers' Act (USL&HW, also known as "F class" business) and National Defense Projects . Claims incurred under these Acts are not adjudicated by the Bureau of Workers' Compensation, Department of Labor and Industry, and no payments from either the Subsequent Injury Fund or the Supersedeas Fund are made for such claims in Pennsylvania.

(c) Premiums attributable to excess policies written for specified retentions on otherwise self-insured employers in Pennsylvania. Because self-insurers will report total claim payments, including payments recoverable under such excess policies, and will pay assessments for the special funds accordingly, including premiums for these coverages would effectively double-count them in the allocation of assessments under the proposed rulemaking.

In terms of premium data, as reported on Part A of Special Schedule "W" in Pennsylvania, the above considerations would suggest that the most appropriate basis for allocation of special fund assessments between commercial insurers would be derived as follows:

Combining Part(s) A1, A2 and A-3, add Line 5 plus Line 8A plus Line 8B.

This approach is as consistent as possible with the inclusions and exclusions noted above. It should be noted that the adjustments for deductible coverages presented on Lines 8A and 8B are stated on Schedule W at the "designated statistical reporting level" and, thus, would technically be somewhat inconsistent with the basis for Line 5 which is at actual carrier level(s). This inconsistency is much less significant than would be the omission of deductible credits from the allocation basis entirely, the only other option supportable by Special Schedule "W" in its present form. If Special Schedule "W" were amended at some future time to include reporting of premium adjustments for deductible coverages on an actual carrier rate level, the inconsistency observed herein could be eliminated.

The PCRB and CMCRB would note that Special Schedule "W" is no longer filed by individual insurance company in Pennsylvania. As an accommodation to carriers, the Insurance Department presently allows group reporting for Special Schedule "W" and also allows reporting for combinations of companies within a group where the combination(s) represent something less than the entire group with which the companies in question are affiliated. The PCRB and CMCRB do not perceive these reporting procedures to preclude the assessment procedures outlined in the proposed rulemaking. However, these reporting procedures will require some effort in clearly defining, communicating and accounting for which company or companies a given premium figure applies to and how the assessment(s) generated thereby is/are to be paid and credited.

In some instances direct premium earned reported on Special Schedule "W" will be negative. This would generally be limited to unusual circumstances arising for relatively small carriers. However, the arithmetic consequence of retaining such negative numbers in the special funds assessment allocation would be that any carrier(s) having negative direct premium earned would receive refunds from the special funds in the following year. Under such a procedure, the aggregate amount of such refunds would be recovered from the majority of carriers having positive direct premium earned, and the correct total assessment would be realized.

The PCRB and CMCRB recognize that the issuance of refunds might be seen by the Department as being problematic. Employers insured by a given carrier might take particular issue if they found that concurrent with their remittance of special fund assessments to that carrier the insurer was also receiving a net refund from the special funds administered by the Department.

An alternative approach would be to require that all direct premium earned used in the assessment allocation be non-negative values. Under this method negative direct premium earned values would be revised to zeroes, the total direct premium earned would be recalculated accordingly, and the same (correct) total assessment would be realized without producing any refunds or increasing assessments for carriers actually reporting positive earned premiums to balance such refunds. While the PCRB and CMCRB have no compelling interest in the Department's ultimate determination in this regard, we would note that, for purposes of the annual adjustment of assessment performed to allocate PCRB and CMCRB expenses among our respective members, the latter system described above has been used for many years.

Special Funds Assessment Target

The PCRB and CMCRB note that for the Subsequent Injury Fund (121.22 (a) (2) (i)) assessments are to be proportional shares of the amounts of payments actually made in the previous year. For the Supersedeas Fund (121.23 (a) (1)) assessments are to be proportional shares of the amounts of payments actually made or accrued as payable in the previous year. In contrast, for the Administration Fund (121.31 (a)) self-insurers are to be assessed proportional shares of the amount of the current fiscal year budget. The PCRB and CMCRB are not clear whether these differences arise from statutory requirements outside the proposed rulemaking or if the Subsequent Injury Fund and the Supersedeas Fund do not have prospective budgets established or if some other consideration(s) apply. Logically, it would seem appropriate for concurrent assessments supporting all of the special funds to be premised on the same types of information and for consistent periods of time if at all possible.

121.22 Subsequent Injury Fund. (b)

The PCRB and CMCRB believe that it would be very impractical (and might in at least some cases actually be impossible) for an insurance carrier to actually collect from its insured employers the precise amount of the assessment specified in this paragraph.

Achieving this precise balance is impractical because, in order to accomplish this in the simplest case, two things would have to happen. First, each insurer would potentially have a different assessment rate for the special funds. Second, no insurer could determine its assessment rate until after all policies having exposure in a given calendar year had expired and been subject to final audit. In a real world scenario the precise balance implied in this paragraph would often be difficult for a carrier to achieve because most policies have some exposure in each of two successive calendar years. Once an assessment rate appropriate for a given calendar year is determined, the assessment for that portion of the insurer's policies extending into the following year is preordained. Depending on the relative amounts of exposure for these continuing policies and any new or renewal policies written in that subsequent year, balancing to a new assessment target for that later year could require large variations in assessments for a given carrier from year to year and could conceivably result in such anomalies as negative assessment rates.

In some instances (such as for a carrier not writing new or renewal business in a given year) one assessment rate would almost certainly be incorrect for either the last year in which writings were undertaken or for the ensuing "run-off" year.

The PCRB and CMCRB would suggest revising the language of 121.22 (b) and (c) to read as follows:

> 121.22 (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.] 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. On behalf of insured employers, each insurer will remit an amount determined by the formula set forth in subsection (c) of this Section.

(c) Insurance carriers shall remit to the Department on behalf of insured employers assessment amounts determined as follows:

Amount of Earned Premium as Reported to the Insurance Department by an Insurance Carrier for the Preceding Calendar Year	x	Aggregate Amount to be Collected by Insurance Carriers
Total Amount of Earned Premium Reported by All Insurance Carriers for the Preceding Calendar Year		

121.23 The Supersedeas Fund. (a) (3).

The same observations and suggestion advanced above with regard to 121.22 also apply to this section.

121.31 Workmen's Compensation Administration Fund.

The same observations and suggestion advanced above with regard to 121.22 and 121.23 also apply to this section.

121.34 Objections to Assessments.

The only parties to which a "Notice of Assessment Amount to be Collected" will be sent are self-insurers and insurance carriers. Appeals against those notices are to be presented to the Department in specified form.

Although the proposed rulemaking states that an insurer's objecting to an assessment does not relieve its obligation to promptly pay such assessment (see 121.34 (a)), the proposed rule-making also requires payment of the assessment determined by the Department to be appropriate after consideration of the appeal within ten days. This seems redundant, and the PCRB and CMCRB would speculate that what is intended is that any adjustment to the original assessment warranted based upon the Department's findings would be promptly transacted between the insurer and the Department.

Employers aggrieved by their own assessment are allowed and required by the proposed rulemaking to present an appeal of that assessment to the licensed rating organization in accordance with procedures governing all appeals of the rating system in Pennsylvania. In accordance with those prevailing procedures the first appeal would be taken to the rating

organization, and, if the employer remained dissatisfied with the rating organization's decision, a further appeal could be taken to the Insurance Commissioner.

In the event that an employer's special fund assessment is revised by the rating organization, the Insurance Commissioner or the courts, PCRB and CMCRB would note that a likely result of such revision(s) would be that the rating organization's procedures on file with the Insurance Department would be amended to either clarify or correct, as the case may be, the aspect(s) of those procedures found to have precipitated the revision in employer assessment and/or to revise parameters of those procedures so that overall employer assessments remained in balance with insurer remittances.

Timing of Calculation and Collection of Special Fund Assessments

The PCRB and CMCRB would note that the proposed rulemaking does not specify when calculations of special fund assessments will be performed or when the assessments thus generated will be collected. From the standpoint of rating organizations it would be very helpful if the former could be accomplished well in advance of the latter. We anticipate that rating organization filings with the Insurance Department will need to be amended periodically to reflect ongoing changes in assessment amounts and prevailing premium levels in Pennsylvania. If changes in assessments are derived and distributed by the Department without significant lag time between those events, rating organizations will be unable to prepare, submit, secure approval for and disseminate information about filings to maintain consistent and reasonable assessment procedures for employers, as is their responsibility under the proposed rulemaking, in a timely manner and in a fashion to allow reasonable implementation time for insurers responsible for collecting and remitting employer assessments.

Conclusion

The PCRB and CMCRB appreciate the opportunity to present these comments for consideration by the Department and would be pleased to provide any further discussion or explanation thereof upon request of the Department.