

TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 4 WORKERS' COMPENSATION
PART 12 UNINSURED EMPLOYERS' FUND

11.4.12.1 ISSUING AGENCY: New Mexico Workers' Compensation Administration
[11.4.12.1 NMAC - N, 10/15/03]

11.4.12.2 SCOPE: This rule applies to all insurers issuing workers' compensation coverage in the state of New Mexico, all individual self-insured employers, pools of governmental entities, and self-insured groups issuing workers' compensation coverage in the state of New Mexico who are required to pay assessments into the uninsured employers' fund (fund) and all employers in the state of New Mexico who are subject to the Workers' Compensation Act and Occupational Disease and Disablement Law who are required to reimburse the fund.
[11.4.12.2 NMAC - N, 10/15/03]

11.4.12.3 STATUTORY AUTHORITY: Chapter 258, Laws of 2003 and NMSA 1978, Section 52-5-4, authorizes the director to adopt reasonable rules and regulations for effecting the purposes of the Act.
[11.4.12.3 NMAC - N, 10/15/03]

11.4.12.4 DURATION: Permanent
[11.4.12.4 NMAC - N, 10/15/03]

11.4.12.5 EFFECTIVE DATE: October 15, 2003
[11.4.12.5 NMAC - N, 10/15/03]

11.4.12.6 OBJECTIVE: The purpose of this rule is to establish requirements governing the uninsured employers' fund and establishing penalties against uninsured employers pursuant to Chapter 258, Laws of 2003.
[11.4.12.6 NMAC - N, 10/15/03]

11.4.12.7 DEFINITIONS:

A. "Claim" means any allegation of entitlement to benefits under Chapter 258, Laws of 2003, which has been communicated to the uninsured employer's fund or to the fund through the workers' compensation administration.

B. "Eligible" and "eligibility" mean that the claim is properly subject to payment by the fund to the extent that the claim is compensable. The compensability determination is independent of the eligibility determination.

C. "Fund" means the uninsured employers' fund established by Chapter 258, Laws of 2003 as administered by the workers' compensation administration.

D. "Fund administrator" means a designee of the director charged with administering the fund and implementing the provisions of this rule.

E. "Paid losses" are defined as the sum of medical and indemnity payments, exclusive of attorney fees, allocated and unallocated loss adjusting expense, paid during the quarter, for injuries incurred after July 1, 2003, less recoveries by insurers, self insurers, self insured groups or self insured pools of governmental entities under subrogation rights. Payments made by an employer or subject to reimbursement pursuant to a policy deductible or self insured retention shall be included in paid losses.

F. "TRD" means the New Mexico taxation and revenue department.
[11.4.12.7 NMAC - N, 10/15/03]

11.4.12.8 PROCEDURES FOR SUBMISSION OF CLAIMS:

A. Claims may be submitted by any written request for payment addressed to the uninsured employers' fund that states the name, social security number and address of the injured worker, the name and address of the employer for whom the worker was working when the worker was injured or became ill and the date of injury or onset of occupational illness.

(1) If a complaint for benefits is submitted to the clerk and names the fund as a party, the clerk will not accept such complaints for filing or assign the complaint for mediation until an eligibility determination is made and is final, notwithstanding the provisions of any other rule.

(2) The clerk is authorized and directed to transfer any complaint naming the fund to the fund administrator for eligibility determination. The clerk shall date stamp the complaint upon receipt. No further proceedings on the complaint shall take place, until the eligibility determination is made and is final, notwithstanding the provisions of any other rule.

(3) The date of presentation to the fund shall be deemed to be the earliest date shown on the claim or complaint by an official WCA date stamp.

(4) If a claim is presented to the fund administrator prior to the running of the statute of limitations, the date of presentation shall toll the statute of limitations for purposes of filing against the fund.

B. All claims naming the fund as a party shall be submitted to the fund administrator for an eligibility determination.

(1) Only those claims for injuries or illnesses that arose from accidents or exposures occurring on or after June 22, 2003, shall be eligible to make claims against the fund.

(2) Only claims that would have been subject to the terms of the Workers' Compensation Act or occupational disease disablement law at the time of the injury or exposure shall be eligible to make claims against the fund.

(3) Only claims by workers employed by those employers who, despite the obligation to do so, were not insured pursuant to the Workers' Compensation Act shall be eligible to make claims against the fund.

(4) A worker shall not be eligible to make a claim against the fund if the worker has filed a valid election pursuant to Section 52-1-7 NMSA 1978.

(5) No claim that is eligible for payment by an insurer's guaranty fund, a self-insurer's guaranty fund, or pursuant to the joint and several liability provisions contained in the by-laws or other authorizing documents of a certified group self-insurer shall be eligible to make claims against the fund unless that source of payments is demonstrated by the worker to be insolvent and unable to assume the claim.

(6) A district court determination that the employer of a worker making the claim was not insured at the time of the worker's injury or occupational illness shall be conclusive with respect to the issue of insurance coverage only. In such cases, all other eligibility issues are reserved for the fund.

C. The fund shall notify the parties of the eligibility determination in writing, via certified mail, return receipt requested, at the addresses shown on the claim within fifteen (15) working days of receipt of the notification of the claim against the fund as determined by the earliest date stamp appearing on the face of the claim. If the claim is not eligible, the notice shall inform the worker why the claim is not eligible.

(1) Failure to claim the notice of denial from the post office shall not operate to toll the time limits set herein.

(2) Failure to claim the notice will be treated as actual delivery for purposes of further proceedings upon return of the notice to the WCA by the post office.

D. If a party wants a review of the eligibility determination, a request for review shall be filed with the clerk within thirty (30) days from the date of actual or constructive receipt of the eligibility determination. The request for review shall contain all the information required in rule 11.4.12.8 NMAC and shall specify the reason or reasons that he or she does not agree with the eligibility determination.

(1) The director or his designee shall conduct such hearing without undue delay.

(a) The director or his designee shall hold a hearing on any request for review of an eligibility determination.

(b) At any hearing on eligibility, the claimant shall have the burden of proving that the claim arose under the Workers' Compensation Act or Occupational Disease Disablement Law and that the employer was uninsured.

(c) At any hearing on eligibility, the records of the WCA shall be rebutably presumed to establish the insurance status of the employer as of the date of injury.

(d) At any hearing on eligibility the rules of evidence shall be relaxed to the extent necessary to achieve substantial justice.

(e) With respect to any hearing on eligibility, no pre-hearing discovery or motions practice shall be permitted without specific authorization from the director or his designee.

(f) Telephonic and video conferencing appearances shall be permitted, to the extent permitted by law, to facilitate the appearance of the parties.

(2) The director or his designee shall issue an order within 15 working days of the hearing, which order shall be transmitted to the parties via first class US mail at their last known address.

(3) If a party is still aggrieved by the decision of the director or his designee, he or she may file a writ of certiorari to the district court to appeal the decision.

E. After the determination of eligibility is made, if either party wishes to resume resolution of the dispute brought in the complaint, that party shall file a request to resume dispute resolution with the clerk.

F. If a mediator or WCJ determines that it is more likely than not that a complaint before them presents a claim that is eligible for payment by the uninsured employers' fund, the mediator or WCJ shall amend the caption of the complaint to name the fund as a party. Any complaint amended pursuant to this provision shall be forthwith returned to the WCA clerk for further processing pursuant to the provisions of this rule, notwithstanding the provisions of any other rule.

[11.4.12.8 NMAC – N, 10/15/03]

11.4.12.9 CLAIMS ADMINISTRATION:

A. The WCA may contract with a claims administrator or third party administrator for the adjusting of those claims that are determined to be eligible for payment by the fund, purchase a loss portfolio transfer covering some or all of the liabilities of the fund, or may purchase a policy of commercial insurance to cover the liabilities of the fund upon a finding by the director that such purchases are in the best interests of the workers eligible to receive benefits from the fund and the entities paying assessment to support the fund.

(1) The claims administrator, third party administrator or insurer shall pay, or oppose, claims on their merits, and shall be treated for purposes of mediation and adjudication of disputes as a party with all rights and responsibilities applicable under law.

(2) The claims administrator, third party administrator or insurer may engage counsel for representation when necessary.

B. With respect to any complaint filed with the WCA arising from a dispute about the provision of any benefit due on any claim eligible for payment by the fund, the fund and the employer at the time of injury or last injurious exposure shall be named as parties.

C. The claims administrator, third party administrator or insurer shall regularly report to the WCA on expenditures made to and on behalf of workers from the fund.

(1) The claims administrator, third party administrator or insurer shall file the first report of injury or illness (E1.2) with the WCA within 10 days of the eligibility determination and provide a copy of the E1.2 to the worker.

(2) The claims administrator, third party administrator or insurer shall file all payment reports required by law.

(3) The claims administrator, third party administrator or insurer shall maintain records sufficient to allow the WCA director or his designee to audit the administration of claims and shall provide those records upon request to the WCA. The claims administrator, third party administrator or insurer shall be subject to audit by the WCA or its contractor with respect to the administration of claims against the fund.

(4) The claims administrator, third party administrator or insurer shall actively support the WCA in its efforts provide information to the public concerning the fund and to prosecute penalty collection proceedings against an uninsured employer pursuant to this rule.

D. Lump sum payments.

(1) All requests for lump sum payments shall be set for hearing.

(2) The director's office shall be noticed and treated as a party for all lump sum petitions involving payments from the fund.

E. The fund shall have the right to subrogation that would otherwise be available to the payer.

(1) The claims administrator, third party administrator or insurer shall pursue subrogation rights on behalf of the fund.

(2) The claims administrator, third party administrator or insurer shall be entitled to retain reimbursement for reasonable legal fees and expenses plus 10% of the sum recovered in subrogation net of legal fees and expenses. The remainder of the subrogation recovery shall be paid to the fund.

F. The fund shall be liable only for those benefits that are due under the Workers' Compensation Act or Occupational Disease Disablement Law.

(1) The fund shall be entitled to the protections of the exclusive remedy provisions of the Workers' Compensation Act or Occupational Disease Disablement Law to the same extent it would if it were the insured employer of any worker who is eligible for benefits against the fund.

(2) The fund shall not be subject to claims for payments of a judgment obtained in a third party lawsuit, nor for payment of a judgment obtained in a tort action against an uninsured employer.

G. Duplicate recovery of workers' compensation benefits is strictly prohibited.

(1) The fund shall immediately cease payments to or on behalf of any worker who is receiving workers' compensation payments from another source for the same injury and arising out of the same accident.

(2) The fund shall have the right of first reimbursement for workers' compensation benefit payments made that duplicate any payments received by the injured worker from another source and may offset subsequent payments, institute collection proceedings, request criminal investigation or seek any other lawful remedy to recover duplicate payments of workers' compensation benefits.

H. Payments under the fund shall not constitute payments by the employer for purposes of the exclusive remedy provisions of the Act. The fund shall be entitled to assert all defenses and subrogation rights that would be available to an insured employer.

[11.4.12.9 NMAC – N, 10/15/03]

11.4.12.10 PENALTIES COLLECTED FROM UNINSURED EMPLOYERS: If the fund determines that an employer was obligated to pay workers' compensation benefits to or on behalf of a worker and has not done so due to its failure to obtain and keep in force a policy of workers' compensation insurance that is valid pursuant to the Workers' Compensation Act, the WCA director or his designee shall seek a penalty from the employer of not less than 115% and not more than 150% of all benefits paid to or on behalf of the worker. The determination of the appropriate percentage of penalty imposed shall be treated as a statutorily authorized discretionary act by a state agency, for purposes of judicial review. This penalty is separate from, and in addition, to any penalty or remedy sought against an uninsured employer pursuant to NMSA 1978, Sections 52-1-61 or 52-1-62 for failure to have insurance when required to do so. This penalty is intended to protect the health, safety and welfare of the citizens of the state of New Mexico and shall be considered a governmental penalty for purposes of the dischargeability provisions of the federal bankruptcy code.

A. The WCA may use any legal process for collecting the penalty, including, but not limited to, reduction of the penalty to judgment in district court, seeking and obtaining writs of garnishment and execution, contempt citations or any other legal process in aid of collection and participating as a party in any bankruptcy action, including filing an involuntary petition in federal bankruptcy court to liquidate personal or business assets for the purpose of enforcing the penalty.

B. For the purposes of these actions, the WCA shall, at all times act pursuant to the commissions of its personnel as special assistant attorneys general. All proceedings before the WCA director for enforcement of the provisions of this section shall be conducted in accordance with 11 NMAC 4.5.

C. The fund may seek reimbursement of the costs of any legal action instituted in a proceeding to determine or collect a penalty pursuant to this subsection, but shall not seek reimbursement of legal fees, provided that the fund may collect reasonable attorneys fees to offset the fees incurred by the retention of outside counsel to collect any penalty.

[11.4.12.10 NMAC – N, 10/15/03]

11.4.12.11 ASSESSMENTS:

A. The fiscal year of the fund coincides with the fiscal year of the state.

B. Reporting of paid losses and payment of assessments based on those paid losses is due on or before the end of the month following each calendar quarter, commencing July 1, 2003, on a form provided for that purpose by the New Mexico taxation and revenue department ("TRD"). All reports and payments shall be delivered directly to TRD.

(1) An insurer has the sole responsibility to report paid losses and pay assessments for all of its policy holders.

(2) A group self-insurer has the sole responsibility to report paid losses and pay assessments for all its members.

(3) An individual self-insurer has the sole responsibility to report its paid losses and pay assessments for it, provided that if the individual self-insurer is a governmental entity, the obligation to pay the assessment shall exist only to the extent permitted by law.

(4) A pool of governmental entities has the sole responsibility to report its paid losses and pay assessments for all members of the pool, provided that the obligation to pay the assessment shall exist only to the extent permitted by law.

C. An assessment payer shall have the right, to the extent permitted by law, to flow assessments through to their policy holders or to the members of their groups.

D. Assessments for group self-insurers may be considered administrative expenses and not claims expenses.

E. Group self-insurers may seek a waiver, on a year-to-year basis, of the percentage allocation of administrative to claims expense, to the extent such allocation is affected by the assessment. The waivers shall be considered upon a showing of need until July 1, 2009. Thereafter, such waiver requests will be discouraged and strictly scrutinized.

F. Reporting of paid losses is required, even if no losses were paid during the quarter.

G. On or before June 1, 2004, and the first day of June of each succeeding year the director shall issue an order that publicly announces the percentage to be applied to paid losses that will form the basis of the assessment for the next calendar year. The order shall be accompanied by an explanation of the rationale and supporting claims and income information used for the determination of the percentage.

(1) In the absence of such an announcement the rate established for the prior year shall remain in force.

(2) The director shall set the rate at the lowest rate that provides sufficient funds to cover all known and anticipated claims and expenses payable by the fund during the next 12 months, taking into account the residual fund balance and liabilities at the time of the determination up to the amount set by law.

(3) The director may contract with an actuary for determination of the assessment necessary to insure fiscal solvency of the fund and pay the expense of the actuarial study from the corpus of the fund.

H. Penalties, pursuant to NMSA 1978, Section 52-1-61 for non-reporting, incorrect reporting or non-payment of assessments due shall accrue on a monthly basis, with each month of noncompliance constituting a separate offense.

(1) Penalties pursuant to this provision shall be in addition to any penalties imposed by the New Mexico department of insurance or the New Mexico taxation and revenue department.

(2) The director may seek any remedy available under law for enforcement of penalties imposed pursuant to this provision.

(3) The respondent shall pay costs incurred to enforce penalties.

[11.4.12.11 NMAC – N, 10/15/03]

11.4.12.12 MISCELLANEOUS PROVISIONS

A. The fund may purchase excess insurance from the fund corpus if, in the judgment of the director, it is fiscally prudent to do so.

B. Auditing of the fund by the superintendent of insurance shall occur yearly, commencing thirty (30) days after the close of the fund's fiscal year.

(1) The final report of the audit of the fund (after an opportunity to contest and respond to findings made by the auditor) shall be treated as a public document.

(2) In the event of any audit exceptions in the final report of the audit, the fund will issue a public statement of corrective actions that it will implement to prevent future exceptions.

(3) The fund shall comply with all requirements for the reporting of losses and claims expenditures for statistical purposes that would apply to a self-insured employer.

[11.4.12.12 NMAC – N, 10/15/03]

HISTORY OF 11.4.12 NMAC: [RESERVED].