



AMERICAN ACADEMY *of* ACTUARIES

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January 4, 2000

James L. DeMarcei  
Director, Division of Coal Mine Workers' Compensation  
Room C-3520  
Frances Perkins Building  
200 Constitution Avenue NW  
Washington, D.C. 20210

RE: Federal Coal Mine Health and Safety Act Proposed Rules

Dear Mr. DeMarcei

I am writing to you as Chairperson of the American Academy of Actuaries' Workers' Compensation Working Group to comment on the proposed rules to implement the Federal Coal Mine and Safety Act published in the *Federal Register* on October 8, 1999.

The American Academy of Actuaries is the public policy organization for actuaries practicing in all specialties within the United States. A major purpose of the Academy is to act as the public information organization for the profession. The Academy is non-partisan and assists the public policy process through the presentation of clear and objective actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal elected officials, comments on proposed federal regulations, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualification and practice and the Code of Professional Conduct for all actuaries practicing in the United States.

The Academy believes that there are some fundamental issues raised by the revised proposal which are worthy of comment. The purpose of this document is to address the issues of the retroactivity of the application of the proposed rules and the resulting unfunded liabilities embodied in the revised proposal. Both of these issues have particular consequences for the workers' compensation programs which secure the payment of benefits prescribed by the Black Lung Benefits Act.

Unlike many personal benefits programs (e.g. unemployment, social security), workers' compensation is a pre-funded system. This means that employers' obligations to secure the payment of benefits must be satisfied prior to the occurrence of claims for those benefits. When an insurance policy covering workers' compensation is issued, the obligation to pay the specified benefits is transferred from the employer to the insurer. In consideration of this transfer of risk, the employer agrees to pay an insurance premium amount based upon rates which have been authorized by state regulators for the required statutory benefit coverages.

When state legislatures amend the benefit provisions of their state workers' compensation systems, the new benefits only apply to claims which occur in a future period. This allows the premium rates to be modified to reflect the revised benefit structure, thus maintaining the pre-funding feature of the system. If benefit changes are to be applied retroactively, state legislatures need to provide a mechanism to fund such benefit changes.

Mid-term changes in insurance benefit structures are not actuarially sound and consequently can threaten the financial security of the benefits program and lead to dislocations in the insurance marketplace. To the extent that the revised proposal results in an unanticipated benefit or administrative costs imposed on prior claims for benefits, retroactive costs will be created. Premium rates are based upon known benefit structures in order to maintain a balance between risk transfer and insurance premiums.

The "Preliminary Regulatory Flexibility Analysis" prepared at the request of the Department seems to recognize that additional costs will emerge due to (among other issues) claims re-filings and the adoption of a broader definition of pneumoconiosis. Claims re-filings, following previous final administrative action, are virtually unknown in workers' compensation and their costs cannot be anticipated in a pre-funded system, nor can insurers pass on such higher costs to employers. There are both legal and competitive barriers to any attempt by an insurer to pass on retroactive costs. Not only are insurers and self-insureds who have provided coverage exposed to unrecoverable costs, potentially threatening their financial condition, new carriers for the involved risks will have an advantage because they are not liable for those retroactive costs. Similarly, the higher costs associated with a broadening definition of pneumoconiosis can not be recovered for policies which have previously been issued at rates which could not contemplate the broader definition.

The Department's revised proposal creates retroactive cost increases which conflict with the pre-funded nature of workers' compensation insurance, potentially threaten the security of black lung benefit payments and can create marketplace disruptions. Because the Department's proposal creates retroactive cost increases applicable to prior periods of insurance coverage for workers' exposure to black lung and in light of the pre-funded nature of workers' compensation, it is fair to identify these increased costs as unfunded liabilities. Based on the results of the Department's "Preliminary Regulatory Flexibility Analysis," "increased costs in the range of 22% to 60% are expected to result from the revised proposal." The basis for this estimate includes increased awards and increased medical costs, a portion of which will derive from claims re-filings and broadened eligibility for pneumoconiosis benefits. As stated above, retroactive cost increases will be created by the revised proposal and regulatory, financial and insurance accounting practices will require the recognition of these higher costs in the form of increased liabilities. Along with insurance carriers, self-insured mine operators will also be forced to recognize these higher liabilities and they will not be able to pass on any of these costs to them in the future.

The Department's revised proposal creates unfunded liabilities for insurers and self-insured coal mine operators. If the Regulations are going to result in changes to costs, then they should be implemented on a prospective basis only, i.e., they should apply to new claims from new claimants only. If they are implemented retroactively, i.e., if they apply to reopenings of currently pending or previously adjudicated claims also, then the Department needs to provide a funding mechanism to cover the retroactive costs.

Sincerely,

Nancy Treitel, FCAS, MAAA, ARM, CPCU, Chairperson  
Workers' Compensation Working Group