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MEMORANDUM

TO: Committee on Legal Services

FROM: Jacob Baus, Office of Legislative Legal Services

DATE: December 5, 2018

SUBJECT: Rules of the Colorado Uninsured Employers Board, Department of Labor and Employment, concerning the Colorado Uninsured Employers Fund, 7 CCR 1106-1 (LLS Docket No. 180386; SOS Tracking No. 2018-00244).¹

Summary of Problems Identified and Recommendations

No statute authorizes the Colorado Uninsured Employers Board (Board) to void an order issued by the Office of Administrative Courts (OAC) or the Director of the Division of Workers' Compensation (Director) for improper notice. But the Board's Rule 2-1 (B) authorizes the Board to void an order for improper notice. **Because the Board lacks statutory authority to promulgate Rule 2-1 (B), we recommend that Rule 2-1 (B) of the Board concerning the Colorado Uninsured Employers Fund (Fund) not be extended.**

No statute authorizes the Board to require all Workers' Compensation Act (WCA) claimants to file a notice of entitlement with the Board. But the Board's Rule 2-3 (D) requires all WCA claimants to file a notice with the Board. Furthermore, section 24-4-103 (4)(b)(III), C.R.S., requires that agencies' rules are clearly and simply stated so that their meaning will be understood by any party required to comply with them. But Rule

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2019, unless the General Assembly acts by bill to postpone such expiration.

2-3 (D) is so vague that it is impossible to know specifically how to comply with it. **Because the Board lacks statutory authority to promulgate Rule 2-3 (D) and Rule 2-3 (D) is vague, we recommend that Rule 2-3 (D) of the Board concerning the Fund not be extended.**

If the Fund lacks sufficient money to pay claimants at least the minimum benefit rates that the Board establishes, section 8-67-107 (1)(b), C.R.S., requires the Board to prioritize and pay benefits among seven benefit types at reduced rates. But the Board's Rule 3-2 (B)(1) states that it will not pay six of the seven benefit types under those circumstances. Furthermore, inconsistent with section 24-4-103 (4)(b)(III), C.R.S., Rule 3-2 (B)(1) is so vague that it is impossible to know specifically how to comply with it. **Because Rule 3-2 (B)(1) conflicts with the statute and Rule 3-2 (B)(1) is vague, we recommend that Rule 3-2 (B)(1) of the Board concerning the Fund not be extended.**

Analysis

1. No statute authorizes the Board to void an order for improper notice, so Rule 2-1 (B) is beyond the Board's rule-making authority.

H.B. 17-1119 enacted the Colorado Uninsured Employer Act (Act), article 67 of title 8, C.R.S. The Act's purpose "is to provide a mechanism for the payment of covered claims to workers injured while employed by employers who have failed to obtain and maintain the required workers' compensation insurance and to avoid excessive delay in payment and financial loss to injured workers."²

The Act created the Board within the Division of Workers' Compensation (Division), which is within the Department of Labor and Employment (Department).³ The Board is responsible for administering the Fund,⁴ which is the funding source for paying workers injured while employed by employers who have failed to obtain and maintain the required workers' compensation insurance.

When administering claims to the Fund, section 8-67-113, C.R.S., states the circumstances requiring notice from the Division to the Board.

² § 8-67-102 (1), C.R.S.

³ § 8-67-106 (1), C.R.S.

⁴ § 8-67-105 (1), C.R.S.

8-67-113. Procedure. (1) A controversy concerning any issue arising under this section shall be resolved through hearings in accordance with sections 8-43-207 and 8-43-207.5. In any such hearing, a decision of the board to deny benefits may only be set aside upon a showing of abuse of discretion.

(2) **The division shall notify the board of any claim determined or suspected to be uninsured, either at the time of filing or otherwise. Upon the notification, the board is permitted to join the claim as a party** upon written notice to all other parties.

(3) **A hearing must not proceed on the issue of lack of coverage without the board having been notified and provided an opportunity to join the claim as a party. (Emphases added)**

In sum, section 8-67-113, C.R.S., requires the Division to notify the Board regarding claims and hearings to allow the Board to join as a party in its discretion.

Conversely, Rule 2-1 (B) states how the Board will remedy improper notice of an order from the OAC or the Director to the Board.

Rule 2 Claims

2-1 Notice to the Board

(B) Any Application for Hearing or Response to Application for Hearing filed in a claim in which the issue of insurance coverage is endorsed or which is considered uninsured by the Division or which has been accepted by the Board for payment of benefits shall be served upon the Board or its designated representative at the time of filing. **Should OAC or the Director issue any Order without proper notice to the Board, said Order shall not be binding upon the Board and may be voided for purposes of applying to the CUE fund at the discretion of the Board upon notice to all parties. (Emphasis added)**

In sum, Rule 2-1 (B) authorizes the Board to void an order from the OAC or the Director based on a determination by the Board of improper notice.

Section 8-67-113, C.R.S., requires the Division to notify the Board regarding claims and hearings to allow the Board to join as a party in its discretion. The Act is otherwise silent regarding notice to the Board.

In particular, the Act does not authorize the Board to void an order for improper notice.⁵ By authorizing itself to void an order for improper notice, the Board gave itself enforcement authority to remedy improper notice. By doing so, the Board exceeded its statutory authority because the Act does not give the Board enforcement authority to remedy improper notice.

Furthermore, the Board's remedy is not narrowly tailored to cure the noticing error. Rather, the Board's remedy is so severe that it effectively penalizes the claimant for a procedural error committed by the OAC or the Director and provides the claimant no opportunity to cure the procedural error. Under Rule 2-1 (B), a claimant who has done everything correctly to pursue a valid claim could be wholly deprived of the benefit of the Act by enforcement of Rule 2-1 (B).

Because the Board lacks statutory authority to adopt a rule giving itself enforcement authority to void an order issued by the OAC or the Director for improper notice, Rule 2-1 (B) should not be extended.

2. Rule 2-3 (D) is beyond the Board's rule-making authority and is so vague that it is impossible to know specifically how to comply with it.

Rule 2-3 (D) states:

Rule 2 Claims
2-3 Benefits

(D) Any claimant entitled to receive any benefits under the Workers' Compensation Act must file a notice of entitlement to benefits to the Fund for benefits between February 1 and April 1 of each year. (Emphasis added)

In sum, Rule 2-3 (D) requires all claimants under the WCA, articles 40 to 47 of title 8, C.R.S., to file a notice of entitlement to the Fund annually. The notice requirement is not limited to those claimants seeking payment from the Fund, but applies to all workers' compensation claimants.

2.1. No statute authorizes the Board to require annual filings from any claimant under the WCA, so Rule 2-3 (D) is beyond the Board's rule-making authority.

⁵ Section 8-67-108, C.R.S., requires the Board to promulgate rules that will constitute its plan of operation, including, under subsection (3)(c) of that section, rules to establish procedures by which claims may be filed with the Board. But the Board has not yet promulgated rules necessary to address how claims are to be filed with the Board.

While the Board's general rule-making authority requires it "[t]o adopt rules as necessary to carry out the purposes of this article 67...",⁶ Rule 2-3 (D), to the extent it applies to any claimant entitled to receive benefits under the WCA, does not carry out the purposes of the Act. Conversely, Rule 2-3 (D) exceeds the Board's authority under article 67 of title 8, C.R.S., by placing a filing requirement on all WCA claimants, most of whom are not subject to the Act.

Because the Board lacks the statutory authority to adopt a rule requiring all claimants under the WCA to file an annual notice, Rule 2-3 (D) should not be extended.

2.2. Rule 2-3 (D) is so vague that it is impossible to know specifically how to comply with it.

Neither Rule 2-3 (D) nor any other rule provides guidance regarding with whom the claimant must file the notice. The rule indicates a claimant must file a notice "to the Fund"; however, the Fund is a state fund created in the state treasury,⁷ not an entity that can receive notice. Without clarity, the claimant cannot be certain of how to comply with this required filing.

Because the Board's Rule 2-3 (D) is so vague that it is impossible to know specifically how to comply with it, Rule 2-3 (D) should not be extended.

3. Rules 3-2 (B)(1) conflicts with statute and is so vague that it is impossible to know specifically how to comply with it.

As a part of the Board's responsibility to administer the Fund, the Board sets the benefit rates for paying covered claims from the Fund. Section 8-67-107 (1)(b), C.R.S., states the parameters the Board must follow when setting benefit rates.

8-67-107. Powers of the board - rules. (1) The board has the following powers and duties:

(b) To set minimum and maximum benefit rates; except that benefits paid by the fund shall not exceed the maximum allowed under articles 40 to 47 of this title 8 or set forth by order of the director. **Minimum benefit rates shall be at the level required by articles 40 to 47 of this title 8 unless the fund lacks sufficient money as determined by the board. If benefits are paid below the amount mandated by articles 40 to 47 of this title 8, benefits shall be prioritized and paid as follows:**

⁶ § 8-67-107 (1)(f), C.R.S.

⁷ § 8-67-105, C.R.S.

- (I) Medical benefits;
- (II) Funeral benefits;
- (III) Temporary disability;
- (IV) Death benefits;
- (V) Permanent total disability;
- (VI) Permanent partial disability;
- (VII) Disfigurement. **(Emphasis added)**

In sum, section 8-67-107 (1)(b), C.R.S., generally requires the Board to set minimum and maximum benefit rates for the payment of benefits from the Fund within the parameters established by the WCA. The only exception is if “the fund lacks sufficient money as determined by the board.” Under this exception, the Board may set benefit rates lower than the parameters established by the WCA. Additionally, if this exception applies, section 8-67-107 (1)(b), C.R.S., requires benefits to be prioritized and paid based on the type of claim.

Conversely, Rule 3-2 (B)(1) states:

Rule 3 Funding and Review
3-2 Interim reviews

- (B) If funding levels are insufficient to continue paying benefits at the benefit level announced in the annual report the Board may, at its discretion, lower benefit levels for the remainder of the year and/or close the Fund to new applicants.**
- (1) Any claimant denied access to the Fund upon initial application because of lack of funding may reapply the following fiscal year, provided said claimant is still entitled to receive benefits. Any claimant so admitted will be entitled to have only their outstanding medical bills paid dating back to the date of injury subject to the limitations in Rule 2-3(B). (Emphases added)**

In sum, Rule 3-2 (B)(1) permits the payment of only medical benefits in the event the Fund lacks sufficient money as determined by the Board.

3.1. That statute requires prioritization and payment of multiple benefit types but Rule 3-2 (B)(1) requires prioritization and payment of one benefit type, so Rule 3-2 (B)(1) conflicts with statute.

Rule 3-2 (B)(1) conflicts with the Act. If the Fund lacks sufficient money, Rule 3-2 (B)(1) would authorize the Board to pay only outstanding medical benefits and deny all other benefit types. However, the statute clearly requires a prioritization and payment of the seven different benefit types, not just medical benefits. If the General

Assembly intended the Fund to pay only medical benefits in this situation, it would have written the statute accordingly.

The Board might point to its general rule-making authority to ensure the financial stability of the Fund⁸ as statutory support for Rule 3-2 (B)(1). However, the Board's general rule-making authority to promulgate rules that ensure the financial stability of the Fund does not authorize the Board to promulgate a rule that directly conflicts with section 8-67-107 (1)(b), C.R.S., as Rule 3-2 (B)(1) does. The Board may promulgate rules to ensure the financial stability of the Fund so long as those rules are consistent with the Act. The Board has not promulgated those rules here.⁹

Additionally, Rule 3-2 (B)(1) states that any claimant denied access to the Fund upon initial application due to lack of funding may reapply in the subsequent fiscal year if the claimant is still entitled to receive benefits. However, this provision contradicts the purpose of the Act, which is "to avoid excessive delay in payment and financial loss to injured workers."¹⁰ Requiring a claimant to reapply for benefits that the claimant previously accrued and applied for, and only allowing reapplication in the subsequent fiscal year, creates an excessive burden upon the claimant, likely resulting in excessive delay in payment and financial loss.

Because Rule 3-2 (B)(1) conflicts with statute, Rule 3-2 (B)(1) should not be extended.

3.2. Rule 3-2 (B)(1) is so vague that it is impossible to know how to comply with it.

It is unclear what benefit rate applies to benefits that accrued while the Fund was closed due to lack of sufficient funding. A separate rule promulgated by the Board, Rule 2-3 (A), states a general rule for determining applicable benefit rates.

Rule 2 Claims

2-3 Benefits

(A) At the time of initial acceptance into the Fund a **Claimant shall be entitled to receive payment for all benefits which accrued** prior to the date of acceptance, **subject to the benefit levels** set by the Board in the annual report

⁸ § 8-67-107 (1)(f), C.R.S.

⁹ Section 8-67-108, C.R.S., requires the Board to promulgate rules that will constitute its plan of operation, including, under subsection (3)(d) of that section, rules to establish procedures for pursuing actions against uninsured employers to seek reimbursement for benefits paid under the Act. But the Board has not yet promulgated rules necessary to address section 8-67-108 (3)(a), (c)-(f), and (h), C.R.S.

¹⁰ § 8-67-102 (1), C.R.S.

required by Rule 3-1 **which were applicable at the time the benefits accrued. (Emphases added)**

Rule 2-3 (A) states a general rule that the applicable benefit rate is the rate in place at the time the benefit accrued. However, Rule 3-2 (B)(1) contemplates the claimant seeking payment for benefits that accrued while the Fund was closed. In that scenario, the general rule cannot apply because there is no applicable benefit rate when the Fund is closed. Because Rule 3-2 (B)(1) does not articulate what benefit rates apply when reviewing claims accrued while the Fund was closed, the Board itself cannot be certain of how to comply and pay for benefits accrued while the Fund was closed and the claimant cannot be certain of the benefits to which he or she is entitled.

Because the Board's Rule 3-2 (B)(1) is so vague that it is impossible to know specifically how to comply with it, Rule 3-2 (B)(1) should not be extended.

Recommendations

We therefore recommend that Rules 2-1 (B), 2-3 (D), and 3-2 (B)(1) of the rules of the Colorado Uninsured Employers Board concerning the Colorado Uninsured Employers Fund, not be extended because:

1. The Board lacks statutory authority to promulgate Rule 2-1 (B);
2. The Board lacks statutory authority to promulgate Rule 2-3 (D) and Rule 2-3 (D) is vague; and
3. Rule 3-2 (B)(1) conflicts with statute and is vague.