

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 employers in the state of New Mexico who are subject to the Workers' Compensation Act and Occupational Disease and Disablement Law.
[11.4.12.2 NMAC - N, 10/15/03; A, 11/15/04]

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 implementing the purposes of the act.
[11.4.12.3 NMAC - N, 10/15/03; A, 11/15/04]

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

11.4.12.5 EFFECTIVE DATE: October 15, 2003 unless a later date is cited at the end of a section.
[11.4.12.5 NMAC - N, 10/15/03; A, 11/15/04]

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. "TRD" means the New Mexico taxation and revenue department.

F. "UEF in-house counsel" means lawyers who are employees of the workers' compensation administration who litigate claims on their merits on behalf of the fund.

[11.4.12.7 NMAC - N, 10/15/03; A, 11/15/04; A, 12/31/11]

11.4.12.8 PROCEDURES FOR SUBMISSION OF CLAIMS:

A. All claims shall be submitted on a complaint for workers' compensation benefits naming the uninsured employers' fund. The complaint shall contain the name, social security number, telephone number and address of the injured worker, the name, address, and telephone number 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. It shall be the duty of the worker to keep the WCA clerk of the court informed at all times of any changes to worker's address and telephone number.

(1) 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.

(2) 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. Eligibility for benefits.

(1) The initial determination of worker's eligibility for benefits and the compensability of the claim shall be made at the mediation conference required by NMSA 1978, Section 52-5-5.

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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. 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 NMSA 1978, Section 52-5-5, notwithstanding the provisions of any other rule.

[11.4.12.8 NMAC - N, 10/15/03; A, 11/15/04; A/E, 4/1/08; A, 12/31/11]

11.4.12.9 CLAIMS ADMINISTRATION:

A. The WCA may contract with an independent adjusting company 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 fund, in conjunction with the independent adjusting company, if any, 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) With approval of the director, the independent adjusting company may engage outside counsel for representation when necessary.

(3) The fund or the independent adjusting company may solicit information concerning the average weekly wage of the claimant from the employer. Provision of such information to the fund or the independent adjusting company shall not constitute an admission that the claimant was an employee. In the event that the employer does not respond to the request for wage information, the employer will be informed, in writing, at the last known address of the employer, or by any means authorized by the director or his designee, that wages are in dispute and that the employee's evidence concerning wages shall be used to calculate average weekly wage. In the event that the employer does not respond within a reasonable time from the date the letter described in this paragraph, an affidavit from the worker concerning the wages earned while employed by the uninsured employer shall be deemed sufficient evidence upon which to pay benefits. Any suspected fraudulent reporting of wages by any party shall be reported to the enforcement bureau for investigation.

(4) In the event of a dispute concerning the wage basis for benefits, the fund and the independent adjusting company are authorized to pay indemnity benefits, under reservation of rights, to the worker based upon available wage information.

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 independent adjusting company shall regularly report to the WCA on expenditures made to and on behalf of workers from the fund.

(1) The independent adjusting company 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 independent adjusting company shall file all payment reports required by law.

(3) The independent adjusting company 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 independent adjusting company shall be subject to audit by the WCA or its contractor with respect to the administration of claims against the fund.

(4) The independent adjusting company shall actively support the WCA in its efforts to provide information to the public concerning the fund and to prosecute penalty collection proceedings against an uninsured employer pursuant to this rule.

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

(1) The independent adjusting company may pursue subrogation rights on behalf of, and at the direction of, the fund.

(2) The independent adjusting company 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.

E. 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.

F. 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.

G. 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; A, 11/15/04; A, 12/31/11]

11.4.12.10 FINANCIAL RESPONSIBILITY OF EMPLOYER: The employer shall pay claims, costs, interest and penalties for which it becomes obligated under the New Mexico Workers' Compensation Act, the Occupational Disease Disablement Law, and Uninsured Employers' Fund (UEF) Act.

[11.4.12.10 NMAC - N, 10/15/03; A, 11/15/04; N/E, 12/23/05; A, 12/31/11]

11.4.12.11 CAP ON BENEFITS:

A. Notwithstanding the provisions of the Workers' Compensation Act and Occupational Disease Disablement Law, injured employees or an employee's beneficiaries who pursue a claim for benefits from the uninsured employers' fund (UEF) are not guaranteed payment for full workers' compensation benefits from the UEF.

B. The liability of the state, the uninsured employers' fund and the state treasurer, with respect to payment of any compensation benefits, expenses, fees or disbursements properly chargeable against the UEF, is limited to the assets in the UEF, and they are not otherwise liable for any payment. In no case shall the liability of the UEF for payment of indemnity benefits to any worker injured in a job-related accident exceed forty thousand dollars (\$40,000.00) per job related injury or exceed forty thousand dollars (\$40,000.00) for payment of medical benefits per job related injury. If indemnity benefits do not amount to forty thousand dollars (\$40,000.00), any unused portion can be applied to payment of medical expenses, over and above the forty thousand dollar (\$40,000.00) limit for medical benefits.

[11.4.12.11 NMAC - N, 10/15/03; A, 11/15/04; N/E, 12/23/05]

11.4.12.12 PENALTIES COLLECTED FROM UNINSURED EMPLOYERS: If the WCA director or workers' compensation judge 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 the workers'

compensation judge shall impose a penalty against the employer of not less than fifteen percent and not more than fifty percent of the value of the total award in connection with the claim that shall be paid into the uninsured employers' fund. 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. Any final compensation order addressing the compensability of the workers' claim shall not be subject to collateral attack.
- B. The actual benefits provided to or on behalf of a worker or his dependants shall be presumed valid as the basis for the assessment of a penalty.
- C. Billing and medical records in the possession of the UEF or the independent adjusting company shall be considered records of the WCA for purposes of authentication.
- D. Telephonic and videoconferencing shall be permitted to the extent permitted by law to facilitate the participation of the parties.
- E. 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.
- F. 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.
- G. 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
[11.4.12.12 NMAC - Rn, 11.4.12.10 NMAC, 12/23/05; A, 12/31/11]

11.4.12.13 ASSESSMENTS:

- A. The fiscal year of the fund coincides with the fiscal year of the state.
 - B. Beginning with the calendar quarter ending September 30, 2004, and for each calendar quarter thereafter, there is assessed against each employer who is required or elects to be covered by the Workers' Compensation Act a fee equal to two dollars thirty cents (\$2.30) per covered employee. Thirty cents per employee of the fee assessed against an employer shall be distributed to the credit of the uninsured employers' fund.
 - C. 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.
- [11.4.12.13 NMAC - Rn, 11.4.12.11 NMAC, 12/23/05]

11.4.12.14 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.
- [11.4.12.14 NMAC - Rn, 11.4.12.12 NMAC, 12/23/05]

HISTORY OF 11.4.12 NMAC: [RESERVED].