

**BLBA BULLETIN NO. 21-01**

Issue Date: December 7, 2020

Expiration Date: Until further notice

Subject: DCMWC Self-Insurance Process Guidelines**Background:**

The Black Lung Benefits Act (BLBA) requires coal operators to secure the payment of benefits by either purchasing commercial insurance or obtaining the Department's authorization to self-insure those liabilities. 30 U.S.C. 933(a). Authorization to self-insure may be granted or denied at the Department's discretion. 20 CFR 726.101(a). Upon receipt of a completed application for authorization to self-insure, the Division of Coal Mine Workers' Compensation (DCMWC) will examine the information contained in the application, and either deny the request or determine the amount of security "which it deems necessary and sufficient to secure the performance by the applicant of all obligations imposed upon him as an operator by the Act." 20 CFR 726.105. Applicants that fail to provide the amount of security required by DCMWC will be denied authorization to self-insure. Applicants that are denied authorization to self-insure, or disagree with the amount of security set by DCMWC, may request review by the Office of Workers' Compensation Programs (OWCP). 20 CFR 726.104(c).

DCMWC will review each operator authorized to self-insure for potential reauthorization on an annual basis. 20 CFR 726.114. It is DCMWC policy to authorize or reauthorize self-insured status only for those coal mine operators that are financially sound and post adequate security for their current and future obligations under the BLBA.

Applicability: Appropriate DCMWC personnel.

Purpose: This bulletin is being published to provide greater transparency to operators regarding the procedures OWCP employs to ensure compliance with various responsibilities and requirements established by preexisting law. This bulletin does not create new legal rights or obligations. It is a statement of agency policy explaining the agency's current approach to adjudicating self-insurance applications. This bulletin will assist DCMWC personnel in applying OWCP's regulations: (1) whether to authorize (or reauthorize) coal mine operators to self-insure their obligations under the BLBA and (2) how much security should be required from each self-insured operator to guarantee those obligations. DCMWC's determinations on these matters only become the Department's final decision if the operator consents to them, either affirmatively or by failing to timely request review by the OWCP Director.

This bulletin also explains the OWCP Director's role in adjudicating requests for review by operators that disagree with DCMWC's determinations. It does not, however, prescribe factors the OWCP Director must consider, much less treat as dispositive, in resolving these requests for review. Each operator's circumstances are different, and the Department's final action on an individual request for authorization may vary based on the specific facts of that case. The OWCP Director's discretion is limited only by the BLBA, its implementing regulations, and other applicable law.

References: Section 423(a) of the BLBA, 30 U.S.C. 933(a); 20 CFR 726.1, 726.4, 726.7; 20 CFR 726.101-115.

Action:

RESPONSIBILITIES

1. Responsibilities of the Responsible Operator (RO) Section of the Branch of Policy Analysis and Program Standards, DCMWC

The RO Section is responsible for collecting and reviewing information for the self-insurance process. The RO Section is also responsible for recommending actions to the DCMWC Director regarding:

- i. The approval or denial of initial and renewal applications to self-insure;
- ii. The amount of security and form of security (indemnity bond, negotiable securities, letter of credit, and/or 501(c)(21) trust) required from an operator seeking initial authorization or reauthorization to self-insure; and
- iii. Any modification of the amount or form of security required from an operator that is currently authorized to self-insure.

2. Responsibilities of the DCMWC Director

The DCMWC Director (or a DCMWC employee designated by the DCMWC Director) will make initial determinations on the foregoing matters. These initial determinations become the Department's final determination unless the operator timely requests review.

3. Responsibilities of the OWCP Director

The OWCP Director (or an OWCP employee designated by the OWCP Director, other than the DCMWC Director or the employee designated by the DCMWC Director to make initial determinations) will make the Department's final determinations on the foregoing matters in the event of a request for review (see section 7, below).

INITIAL DETERMINATIONS BY DCMWC

4. Self-Insurance Information Collection

a. Initial and Renewal Applications to Self-Insure

The RO Section will request the following information from any coal mine operator who seeks initial or renewed authorizations to self-insure:

- i. Form CM-2017, Application or Renewal of Self-Insurance Authority and all other attachments specified on the form and in the accompanying instructions (including a certified actuarial report of the applicant's existing and future BLBA liabilities with an initial application and every three years thereafter or as necessary to reflect changes in the operator's business);
- ii. Form CM-2017a, Financial Summary for Self-Insured Operators;

- iii. Form CM-2017b, Report of Claims Information for Self-Insured Operators; and
- iv. Any other information necessary to determine an applicant's suitability for self-insurance authorization.

b. Submission of Additional Information

- i. The RO Section will request additional information on an ongoing basis from self-insured operators. This includes a complete Form CM-2017a on a quarterly basis and Forms CM-2017 and CM-2017b annually and other information as appropriate.

c. Failure to Provide Information

- i. DCMWC may deny an initial or renewal application to self-insure, and revoke any existing authorization to self-insure, if an operator does not provide information, in a full and accurate form, that is requested by the OWCP. See 20 CFR 726.112(c).

5. Self-Insurance Authority

This section outlines the steps the RO Section will take to make an initial determination as to whether an operator should be authorized or reauthorized to self-insure its BLBA liabilities.

a. Procedures Applicable to Initial and Renewal Applications to Self-Insure and Annual Submissions of Information by Self-Insured Operators

- i. DCMWC will first determine whether a coal mine operator meets the minimum criteria in 20 CFR 726.101(b)(1)–(3) and (5) for eligibility to self-insure. The minimum criteria are:
 - a. The operator must have been in the business of mining coal for at least three consecutive years prior to its application to self-insure;
 - b. The operator must demonstrate the ability to fully process and service Black Lung claims that are filed against it;
 - c. The operator's average current assets over the prior three years must exceed its current liabilities by the sum of its estimated Black Lung liability during the ensuing year and its annual premium for any indemnity bond;
 - d. The operator must obtain security, in a form approved by DCMWC and in the amount to be determined by DCMWC (see section 6, below); and
 - e. The operator must have at least five full-time employee-miners.
- ii. If the operator does not meet the foregoing criteria, DCMWC will notify the operator of its initial determination that it is not authorized to self-insure (or to continue to self-insure).

b. Request for Review

Any operator dissatisfied with DCMWC's determination that it will not be authorized to self-insure or to continue to self-insure under these criteria may request review as provided in section 7, below.

6. Security Requirements – Initial Determinations

If DCMWC makes an initial determination that the operator is otherwise an appropriate candidate for self-insurance authorization or reauthorization, DCMWC will then make an initial determination as to the amount of security the operator must post as a condition of that authorization or reauthorization under 20 CFR 726.101(b)(4). The determination of the security amount begins with an actuarial estimate of the applicant's existing and future BLBA liabilities, and then proceeds to an evaluation of whether the operator's financial condition justifies allowing it to self-insure with less than full security.

a. Ascertaining Security – Actuarial Estimate

- i. As required by Form CM-2017, each applicant will submit a certified actuarial report using the assumptions and standards published on the DCMWC website. These uniform standards ensure consistency among operators. The required assumptions are derived from actual Black Lung Disability Trust Fund claims data because the Trust Fund is at risk for assuming liability should the operator default and its security deposit prove insufficient. They include (but are not limited to) values for the following measures:
 - Attorney Representation and Fees
 - Award and Denial Probabilities for current and future claims
 - Discount Rate
 - Future Claims
 - Indemnity and Medical Benefits
 - Mortality Tables
 - Non-Spouse Dependents
 - Offsets
- ii. An actuary or other qualified person retained or employed by OWCP may, at DCMWC's request, verify that the operator's actuarial report complies with the standards posted on the DCMWC website and is a reasonable representation of the operator's Black Lung liabilities.
 - a. If DCMWC determines that the report does not comply with the posted standards or is not reasonable (e.g. the report unreasonably understates liability due to problems with data, assumptions, or methodology), DCMWC will ask the operator to either submit a new report that does comply or modify the existing report to correct the data, assumptions, and/or methodology. Repeated failure to provide a satisfactory actuarial report or any other requested information may, in appropriate cases, lead to the denial or cancellation of an operator's self-insurance authorization. See 20 CFR 726.112(c).
- iii. If an applicant believes the assumptions and standards mandated by DCMWC do not accurately reflect its total black lung benefits liability, then it may

submit an additional actuarial report using the assumptions and standards it believes are more appropriate, along with an explanation of why it believes its alternate estimate is more accurate than the required actuarial estimate. DCMWC may have any alternate report reviewed as under subsection ii above.

- iv. If DCMWC believes (based on an alternate report, the opinion of an actuary or other qualified person employed or retained by OWCP, or any other reason) that the required actuarial report does not accurately estimate the applicant's liability in the event of default, DCMWC may base its initial security determination on a different liability estimate with the approval of the OWCP Director.

b. Ascertaining Security – Operator Financial Health

Once DCMWC ascertains the amount of an applicant's existing and future liabilities, the RO Section will ascertain whether the portion of those liabilities that must be secured can be reduced from 100% based on a financial health assessment of the operator using the operator's most recent CM-2017a. The financial health assessment consists of three metrics: one metric measuring profitability and two metrics measuring solvency.

- i. DCMWC will aggregate the three metrics into an overall risk rating (low, medium, or high risk).
- ii. DCMWC will determine the operator's security requirement by multiplying the operator's total black lung benefits liability by:
 - a. 0.7 for low-risk operators;
 - b. 0.85 for medium-risk operators;
 - c. 1.0 for high-risk operators.
- iii. Before the DCMWC Director is asked to approve an operator's security requirement, the RO Section will ask the OWCP Comptroller to assess the accuracy of the financial information reported by the operator on Form CM-2017a. If the Comptroller has concerns about the accuracy of the information reported on Form CM-2017a, DCMWC may seek further information from the operator, including, as appropriate, a revised Form CM-2017a.

c. Notice to Operator

- i. DCMWC will notify the operator in writing of its initial determination as to the required amount and form of security. In addition, DCMWC will send the operator Form OWCP-1, Agreement and Undertaking. The applicant operator has 30 days to either (1) execute and return Form OWCP-1 along with proof that it has provided the required security, or (2) request review of DCMWC's initial determination (see section 7, below). If the applicant does neither, DCMWC will issue the Department's final determination denying or terminating the applicant's authority to self-insure its BLBA liabilities.
- ii. After receiving an executed Form OWCP-1 and proof that the required security has been provided from the operator, DCMWC will notify the operator that it is

authorized to self-insure (or continue to self-insure) its BLBA obligations for a period not to exceed one year (or, in the case of an initial grant of self-insurance authority, not to exceed eighteen months). The operator will also be notified that annual reauthorization applications with supporting documents are due to DCMWC three months before the expiration of their self-insurance authorization.

d. Quarterly Update

- i. At the end of each quarter (March 31, June 30, September 30, and December 31) DCMWC will review each self-insured operator's Form CM-2017a and apply the steps outlined in sections 6(a) and (b) to make initial determinations as to whether the operator's security requirement should be changed. DCMWC may request that the OWCP Comptroller or another qualified individual review the information reported in an operator's Form CM-2017a if DCMWC has concerns about the accuracy of that information. If the Comptroller likewise has concerns about the information's accuracy, DCMWC may seek further information, including, as appropriate, a revised Form CM-2017a from the operator.
- ii. If DCMWC makes an initial determination that additional security is required, DCMWC will notify the operator in writing and enclose Form OWCP-1 for the operator to execute. The applicant has 30 days to either (1) submit proof that it has provided the required security, or (2) request review of DCMWC's initial determination (see section 7, below). If the applicant does neither, DCMWC will issue the Department's final determination terminating the applicant's authority to self-insure its BLBA liabilities. After receiving an executed Form OWCP-1 from the operator and proof that the additional security has been provided, DCMWC will notify the operator that it is authorized to continue to self-insure its BLBA obligations for a period not to exceed one year.

e. Reduction in Security Requirement

Whenever DCMWC makes an initial determination that an authorized operator's security amount may be reduced, OWCP will notify the operator in writing and enclose Form OWCP-1 for the operator to execute if the operator does, in fact, reduce the security already provided.

REQUESTS FOR REVIEW BY OWCP

7. Requests for Review

Any operator whose application to self-insure has been initially denied, or who believes the security amount initially determined by DCMWC is higher than necessary to secure its obligations, may request review of that determination by OWCP.

a. Timing and Form of Requests for Review

- i. An operator must submit a request for review in writing to DCMWC within 30 days of the date of DCMWC's initial determination.
- ii. The operator must submit all evidence supporting the request within 30 days of the request for review, which can be extended at OWCP's discretion. If the operator submits no supporting evidence within the required timeframe, then the initial determination will stand as the Department's final determination.

- iii. During the review process, OWCP may request additional information from the operator, as appropriate. The operator will have 30 days to submit the requested information, which can be extended at OWCP's discretion. If the operator fails to timely submit the requested information within the required timeframe, then the initial determination will stand as the Department's final determination.

b. Conferences

If requested by an operator, OWCP will hold a conference (in person or by telephone or video conference, at OWCP's discretion) before issuing the Department's final determination. The conference will be between the operator's representatives and the OWCP Director (or his or her designee) plus any OWCP employees the OWCP Director (or his or her designee) believes appropriate.

c. Adjudications on review

OWCP will evaluate the operator's arguments and the available relevant evidence to adjudicate whether the operator should be permitted to self-insure under 30 U.S.C. 933(a)(1) and 20 CFR 726.101(b), 726.105. OWCP will consider but not treat as dispositive the factors described in section 6 of this bulletin, as well as the factors described in 20 CFR 726.105, including "such other factors as [OWCP] considers relevant to [the] particular case" under adjudication. OWCP will then issue a written decision either denying the operator's request for review or granting it (in whole or in part). Barring extraordinary circumstances, OWCP intends to issue these decisions within 90 days after all of the operator's evidence has been submitted or a conference is held, whichever is later.

Disposition: Retain this Bulletin until incorporated into the DCMWC Procedure Manual.



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Distribution: All DCMWC Staff

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