

**COMMONWEALTH OF PENNSYLVANIA**  
**Department of Environmental Protection**  
**Office of Chief Counsel**

May 23, 2008  
717-787-7060

**SUBJECT:** Distribution of Surplus Funds

**TO:** Joseph Pizarchik  
Chairman  
Coal and Clay Mine Subsidence Insurance Board

**FROM:** Marc A. Roda  
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Bureau of Regulatory Counsel

This is in response to The Coal and Clay Mine Subsidence Insurance Board's ("Board") request for a legal opinion analyzing section 10(c) of the Act of August 23, 1961 (P. L. 1068 No. 484), *as amended*, 52 P.S. §§ 3201-3226 ("Act"), as to the Board's ability to define the class of subscribers to the Coal and Clay Mine Subsidence Insurance Fund ("Fund") to receive a distribution of excess monies from the Fund. In addition, the Board requested to know if it could use the rulemaking authority under section 19 of the Act to modify the class of subscribers defined in Section 10(c) of the Act. As explained below, if the Board decides to distribute excess monies that distribution must be made to the Fund's subscribers at the end of the fiscal year for which the excess is declared. The Board cannot by regulation redefine this class of subscribers. The disbursement takes the form of either a credit towards the renewal of policies for those who remain subscribers to the Fund or a cash payment to those who cease being subscribers to the Fund.

**Background**

Since 1961, the fund has insured owners of structures against the risk of damage due to subsidence from underground coal or clay mines. The Fund's reserves have been consistently growing. By the end of this fiscal year, June 30 2008, the Fund's reserves are expected to be approximately 66 million dollars.

Pursuant to the 1972 amendment to Section 10(c) of the Act, the Board started annually declaring a modest excess of monies to cover the Board's administrative costs. This determination is normally made at the Board's meeting in December and is based on financial records kept on the Commonwealth's fiscal year.

While the Fund's reserves have been more than adequate to cover its insured losses, the Board has remained concerned about the adequacy of the Fund's reserves. This is because the Fund's total insured liabilities are in excess of eight billion dollars. As a result, the Board authorized an actuarial study to determine whether the Board should acquire reinsurance to cover catastrophic losses and the extent to which the Fund's reserves can be characterized as excess monies.

At the April 18, 2008, meeting the Board reviewed the draft actuarial report with its authors. The report does not estimate the amount of excess monies. Instead, it characterizes the Fund's projected excess to be "more than sufficient to see it through several years of significant underwriting loss and probably even withstand significant catastrophic loss." The Actuarial Report also recommends a significant rate decrease.

The Board requested the report's authors to finalize the report by determining the amount of the Fund's excess monies. This information is needed for the Board to evaluate whether to distribute some of the excess monies to the Fund's subscribers pursuant to Section 10(c) of the Act. Issues related to distributing those monies were then discussed. Some of the board members expressed the opinion that it would be equitable to distribute the excess monies to those individuals who contributed in past years to the excess. The Board requested a legal opinion analyzing Section 10(c) of the Act and the Board's rulemaking authority to determine the Board's ability to redefine the class of subscribers to receive a disbursement of excess monies.

### **Legal Analysis**

The Board's ability to disburse excess monies from the Fund is governed by Section 10(c) of the Act. It provides:

The board shall keep an accurate account of the money paid in premiums by the subscribers and the disbursements on account of damages to the premises thereof, and if at the expiration of any year there shall be a balance remaining after deducting such disbursements, the unearned premiums on undetermined risks and the percentage of premiums paid or payable to create or maintain the excess provided herein, and after setting aside an adequate reserve, so much of the balance as the board may determine to be safely distributable may either be allocated to the cost of administering the fund or be distributed among the subscribers in proportion to the premiums paid by them and the proportionate share of such subscribers as shall remain subscribers to the fund shall be credited to the installment of premiums next due by them and the proportionate share of such subscribers as shall have ceased to be subscribers in the fund shall also be refunded to them out of the fund in the manner hereinafter provided.

52 P.S. § 3210(c) (*emphasis added*).

The purpose of construing Section 10(c) is to ascertain and effectuate the General Assembly's intention in adopting section 10(c). 1 Pa.C.S. § 1921(a). The Unambiguous words in Section 10(c) are to be accorded their plain meaning. 1 Pa.C.S. §§ 1903 and 1922.

As an initial matter, the Board's determination concerning the existence and use of excess funds is made at the "expiration of each year." The only ambiguity is whether the General Assembly meant the calendar or the fiscal year. Since the Fund is part of the Commonwealth it is reasonable to conclude that the General Assembly intended the Fund to keep its records in accordance with all other Commonwealth agencies, *i.e.* the fiscal year running from July 1 through June 30.

Given the structure of Section 10(c) of the Act, the requirement that the Board's determination concerning excess monies must be made at the expiration of the fiscal year controls the construction of rest of the section. Therefore, the subscribers entitled to a share of the distribution are those in existence at the end of the fiscal year for which excess monies is determined.

This construction is supported by the prospective nature of the language describing the method of distribution. Persons who remain subscribers to the Fund shall receive a credit to their next premium payment. Only those who cease being subscribers to the Fund receive a refund payment. Obviously, the Board cannot give a subscriber a credit on premium renewals made prior to the determination to disburse excess funds.

This construction is also supported by the method of determining the amount of distribution to individual subscribers. Each subscriber's share of the distribution is in proportion to the subscriber's paid premiums. This proportion is easily determined if the Board is focused on the current fiscal year. Allowing the Board to define a class of subscribers other than those in existence at the expiration of each fiscal year is at best arbitrary and the record keeping issues needed to determine proportional share of paid premiums are significantly more complicated. Therefore, if the General Assembly had intended a distribution of excess funds to go to persons other than subscribers at the expiration of the fiscal year of the determination, it would have used explicit language to that affect.

The Board cannot use its rulemaking authority under Section 19 of the Act to expand the class of subscribers to receive a distribution of excess funds. This is because regulations cannot exceed the Board's authority granted by the Act. *See e.g., Hospital association of Pennsylvania et al. v. Gordon K. MacLeod, M.D., Secretary of Health, and the Department of Health of the Commonwealth of Pennsylvania*, 410 A.2d 731 (1980); and *City of Harrisburg v. DER and Cumberland County*, 1994 EHB 1309.

**Conclusion**

For the reasons discussed above, Section 10(c) of the Act mandates that a distribution of excess funds go to the persons who are subscribers to the Fund at the expiration of the fiscal year for which a distribution of excess monies is declared. Furthermore, the Board cannot by regulation change this class of subscribers.

cc: Charles Romberger, Insurance Department Board Member  
Debra Eskin, Treasury Board Member