

DOL'S NEW SELF INSURANCE APPROACH WILL IMPOSE UNNECESSARY FINANCIAL BURDENS ON THE COAL INDUSTRY

Miners who qualify for benefits deserve coverage – and are receiving it. Industry is committed to ensuring that all miners disabled from black lung disease receive the benefits deserved and is already paying in multiple ways to ensure that happens. Created by Congress in 1977, the Black Lung Disability Trust Fund (BLDTF) is funded by an excise tax that is levied on every ton of coal produced and used domestically to pay the cost of claims when no last responsible mine operator can be identified. OWCP was charged to defend such claims but has deferred from actively defending many non-meritorious claims and allowed the program to compensate disabled smokers rather than those with significant coal mine dust related diseases.

Since the program's peak in 1982, the number of beneficiaries has decreased by 85% from approximately 175,000 to less than 26,000 today. In fiscal year 2019, 82 percent of the 1,195 approved claims were assigned to the last responsible operator. Mining operators are directly paying for these claims.

Along with the excise tax, and separate from the fund, each coal mine operator is responsible for paying benefits to its miners. Mine operators must either purchase commercial insurance or obtain authorization from the Department of Labor's (DOL) Office of Workers' Compensation Program (OWCP) to self-insure. A self-insured coal mine operator assumes the financial responsibility for providing black lung benefits to its eligible employees by paying claims when incurred. For self-insurance applicants, OWCP sets a security amount the operator must post as collateral for benefits payments. Agency procedures do not permit operators with net worth less than \$10 million to self-insure.

Although self-insurers are to reauthorize each fiscal year, OWCP has routinely not conducted annual reviews of a mine operator's financial suitability to self-insure its black lung obligations. The annual review is intended to provide OWCP with the opportunity to require prospective adjustments to the operator's self-insurance obligations based on the claims experience during the year preceding the review. The annual review process languished resulting in millions in liability being assumed by the BLDTF.

The OWCP's new self-insurance process will have significant adverse consequences on the industry. The bankruptcies of several large self-insured mine operators that began in 2014 caused OWCP to reevaluate its self-insurance procedures. Proposed changes ask coal operators to overcompensate for mistakes the agency made in self-insurance decisions made in the past by astronomically increasing the self-insurance cost by hundreds of millions of dollars.



Although OWCP has not yet processed all self-insurance renewals, preliminary data indicate that the collateral amount for one operator increased 1100 percent from what it reserved in the past. In another case, the actuarial analysis from OWCP was more than 100 percent higher than the report prepared by the operator's insurer. After OWCP's new self-insurance program is fully implemented, the coal industry's combined increase for collateral will amount to hundreds of millions of dollars. Rather than providing clarity so operators understand the criteria under which their applications will be evaluated, the new program disserves miners, employers and insurers by increasing security amounts by a factor of 10 or more.

The new self-insurance process appears to be an attempt to re-write, under the guise of data collection, the Part 726 regulations governing the authorization for self-insurance. As the OWCP is aware, the ability to self-insure under reasonable terms is a statutory right that must be offered by the Department under 30 U.S.C. 933 (a) pursuant to published regulations. In July 2019, the OWCP issued information collection requests to coal operators who self-insure liabilities for black lung benefits. While OWCP characterizes the new self-insurance collection requirements as merely providing it with sufficient information to determine whether a coal mine operator should continue to be authorized to self-insure, OWCP's actions are uninformed by the necessary public input and debate and are in violation of the Federal Mine Safety and Health Act and the Administrative Procedure Act.

OWCP's new self-insurance program is designed effectively to deny operator self-insurance applications. Although OWCP is trying now to correct past administrative mistakes and mismanagement, the agency is not using fair, accurate, company-specific data to set security terms. Instead of considering each coal company as a unique entity with its own financial condition and historical record of black lung claim losses, OWCP created a generic liability analysis without connection to an individual company's financial reality and specific actuarial analysis. The generalized assumptions are arbitrary and capricious. Such generic formulas raise serious concerns about ensuring the stability of the BLDTF. Additionally, the inability or unwillingness of OWCP in sharing guidelines for determination of self-insurance qualification implies a lack of trust in the respondents and an arbitrary process or agenda that it chooses not to disclose.

The OWCP's program will force operators to purchase costly and limited commercial insurance. Given the withdrawal of insurers for black lung liabilities from the marketplace, OWCP's action creates the potential that the BLDTF will become the insurer of last resort.

OWCP's self-insurance program needs reform, but not in the manner OWCP is executing. The program has been in place for over 40 years, and any effort to revise it in a significant way would have benefitted from a joint and collaborative effort that included all stakeholders.

- **To avoid crippling financial burdens on the coal industry, OWCP must immediately return to its previous framework of using each company's unique black lung history experience and financial condition to determine security amounts.**
- **Additionally, OWCP should explain why a company's actuarial analysis should not be used instead of OWCP's apparent preference for a "one size fits all approach."**
- **To further minimize the financial burden on the coal industry, any requirement to post increased security must be staggered over years and not imposed as a lump sum due to 30 days as originally requested.**

These changes will provide clarity to operators and reduce the financial risk for the BLDTF.