

STATEMENT OF CONSIDERATION
RELATING to 803 KAR 25:021

Labor Cabinet, Department of Workers' Claims
(Not Amended After Comments)

I. The public hearing on 803 KAR 25:021, scheduled for May 25, 2021, at 10:00 a.m., to be held by videoconference by the Department of Workers' Claims, Mayo-Underwood Building, 3rd Floor, 500 Mero Street, Frankfort, Kentucky, was held by Interim Commissioner Robert Walker. Two (2) public comments were made at the hearing. Two (2) written comments were received during the public comment period.

II. The following persons were noted as attendees or offered comment:

(a) Gary Davis, Executive Director, Kentucky Coal Employers' Self-Insurance Guaranty Fund

(b) Greg Mitchell, Transform Holdco, LLC

III. The following persons from the administrative body were present at the hearing or responded to comments:

(1) Robert Walker, Interim Commissioner, Department of Workers' Claims

(2) B. Dale Hamblin, Jr., Assistant General Counsel, Workers' Claims Legal Division

(3) Scott Wilhoit, Special Assistant to the Commissioner, Department of Workers' Claims

IV Summary of Comments and Responses

(1) SUBJECT MATTER: Definitions.

(a) Comment: Gary Davis - The comment opined the definitions of “security” and “security proceeds” were unclear; specifically, the comment asserted that once a security instrument was called and converted into cash money it could no longer constitute security.

(b) Response: The Department disagrees with the assertion that simply because the issuer of a security instrument has paid the commissioner cash money in response to the call of a security instrument that the cash no longer operates to assure the payment of compensation liabilities incurred by the formerly self-insured employer during its period of self-insurance. No amendment was made in response to this comment.

(2) SUBJECT MATTER: Specific Excess Insurance.

(a) Comment: Gary Davis - The comment recommend that specific excess insurance be purchased with statutory limits, that the DWC require, with the initial application and all future annual renewals, the self.-insured employer to provide the full excess policy with all endorsements. Additionally, the comment recommended that when an employer seeks permission from the Commissioner for a maximum retention level greater than \$1,000,000, the Commissioner must require additional security in an amount that would cover the gap between the \$1,000,000 retention level and the greater amount approved by the Commissioner. Further, the comment urged that the appropriate guaranty fund be given notice of the increased retention prior to its effective date in order to allow the guaranty fund an opportunity for comment.

(b) Response: Because the Department has no ability to require additional security from formerly self-insured employers, it cannot reflect in the amount of required security any

retention levels in excess of \$1,000,000. However, the Department currently takes retention levels into account when determining the amount of required security. No amendment was made in response to this comment.

(3) SUBJECT MATTER: Default.

(a) Comment: Gary Davis - The comment asserted that KRS 342.345 and 342.908 were in conflict because KRS 342.345 required the security to be maintained in the with the commissioner or under the commissioner's control until every claim for workers' compensation has been paid, been settled, or lapsed under KRS Chapter 342 while KRS 342.908 states that the cash money received by the commissioner in response to a call of security and transferred to a guaranty fund "vests" in the guaranty fund. The comment asserts that "vest" means, or should mean, to invest the guaranty fund with full and complete possession, title, and ownership, of the security. The comment further asserts the security cannot be in the possession and ownership of the guaranty fund and still be under the commissioner's possession or control. The comment urges an amendment to make clear the security proceeds are the property of the guaranty fund.

(b) Response: The Department disagrees with this interpretation of KRS Chapter 342. The Department does not understand KRS Chapter 342 to provide the guaranty funds ownership of the security proceeds; rather, those monies vest so that they can be used for no purpose other than to pay incurred compensation liabilities. This understanding of KRS 342 allows the commissioner to maintain control over the security proceeds, order the guaranty fund to begin paying the member's compensation claims using the security proceeds (see KRS 342.908(2)), and allows the commissioner to determine when an employer no longer has workers' compensation

liability. The Department has considered the comment but no amendment was made in response to this comment.

(4) SUBJECT MATTER: Security.

(a) Comment: Greg Mitchell – The comment stated an objection to a self-insured employer's minimum security requirement being \$5,000,000.00 when the employer is allowed to deposit cash or securities in place of a bond or letter of credit. The comment asserted that the number was arbitrary and removed the commissioner's discretion to set a lesser amount based upon reasoned professional standards.

(b) Response: This standard is not arbitrary but reflects the Department's past experience. Simply stated, when a self-insured employer declares bankruptcy, its property becomes a part of the bankruptcy estate and a multitude of rules related to that estate come into play. The Department's experience has taught it that acquiring security from the estate is costly, time consuming, and may result in a claim of a lesser amount than the penal sum, all of which defeat the purpose of the security. As a consequence, employers allowed to deposit cash or securities will be employers who are financially sound and capable of depositing the minimum security amount. It helps assure the Department that any such employer is highly unlikely to be filing for bankruptcy protection, which lessens the possibility the Department will be required to expend time and resources attempting to acquire the security from a bankruptcy trustee. The Department is also mindful that the opportunity to self-insure is not a right but a privilege granted to those who are able to prove their ability to directly pay compensation liabilities as incurred; not all employers have this capability. The Department has considered this comment but no amendment was made in response.

(5) SUBJECT MATTER: Voluntary Surrender of Certificate and Revocation of Certificate

(a) Comment: Greg Mitchell – The comment noted that under the proposed administrative regulation an employer who is no longer authorized to self-insure is required to maintain the required security as last established by the commissioner for a period of five (5) years; the employer may then seek a reduction no more often than every thirty (30) months. The comment summarized the proposed administrative regulation as placing the burden on the employer to prove the security amount last determined by the commissioner is excessive and a reduction is warranted. The comment asserted the “excessive” standard was unclear and abandoned the well-reasoned considerations set forth in Section 5 of the proposed administrative regulation.

(b) Response: As an initial statement, the time periods set forth in the proposed administrative regulation reflect the Department’s past experience; simply stated, it takes a while for claims to mature so that fairly accurate estimates can be made. Secondly, “excessive,” as used in the proposed administrative regulation means “in excess” or “greater than is needed.” There is nothing in the proposed administrative regulation that precludes an employer from using the well-reasoned considerations set forth in Section 5 to demonstrate that the security currently held by the commissioner is greater than what is needed; in other words, the security exceeds the compensation liability it is securing. The Department has considered this comment but no amendment was made in response.

V. SUMMARY OF STATEMENT OF CONSIDERATION AND ACTION TAKEN BY PROMULGATING ADMINISTRATIVE BODY

The public hearing on this administrative regulation was held and two written comments received reiterating the spoken comments. The Department of Workers' Claims responded to the comments and will not be amending this administrative regulation.